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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-712

JOHN PAUL JONES AND RUTH J. RUBEL JONES,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No. .....

JOHN PAUL JONES AND RUTH J. RUBEL JONES,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners John Paul Jones and Ruth J. Rubel Jones respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this case on Au-

gust 21, 1972, affirming the judgment against them in a federal income tax refund case on the ground of collateral estoppel, an issue ruled in their favor by the United States District Court for the District of Kansas.

Petitioners filed a timely Petition for Rehearing in the Court of Appeals, which was denied.

This case involves Petitioners' suit for refund under claim of right to capital gains treatment on a portion of their federal income tax returns for the tax years 1958, 1959, 1960, and 1961.

The ruling of the Court of Appeals, applying the doctrine of collateral estoppel, was based on the judgment against petitioners in a prior action involving the tax years 1956 and 1957, reported in the case of John Paul Jones and Ruth J. Rubel Jones v. United States, 10 Cir., 387 F.2d 1004 (Appendix I, p. A53).

(a) OPINIONS BELOW

Memorandum Opinion and Order of Judge Arthur J. Stanley, Jr., United States District Judge who tried the first case, overruling Defendant's Motion for Summary Judgment on the issue of collateral estoppel, filed June 4, 1970, not published but set out in the Appendix as Appendix E, p. A29.

Opinion of the United States Court of Appeals for the Tenth Circuit in this case reported in ..... F. 2d. ....., and set out in the Appendix as Appendix A, p. A1.

The Joint Petition for Rehearing of Petitioners was timely filed and is set out in the Appendix as Appendix B, p. A10.

(b) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(1) The opinion and judgment sought to be reviewed was entered on August 21, 1972.

(2) The order overruling and denying Petitioners' Joint Petition for Rehearing was entered on September 22, 1972. This Petition for Certiorari is filed less than 90 days from the time aforesaid.

(3) The jurisdiction of this Court is invoked under Title 28, Section 1254(1). *C. I. R.* v. *Hansen*, 360 U.S. 446, 450, 79 S.Ct. 1270, 1273(1), 3 L.Ed.2d 360.

(c) QUESTIONS PRESENTED FOR REVIEW

Whether, although purporting to follow and apply the applicable principles of law laid down in the controlling decision of this Court in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898, and other decisions of this Court and other Circuits on similar facts, the Court of Appeals for the Tenth Circuit, in affirming the judgment for defendant below under the doctrine of collateral estoppel in light of the facts of this case, has not so far departed from the accepted and usual course of judicial proceedings in federal income tax cases as to call for the exercise of this Court's power of supervision for the reasons that it attempts to overrule this landmark opinion of this Court in the *Sunnen* case; that it strikes down established limitations and restrictions on use of such doctrine in federal income tax cases, decides questions of importance in the administration of federal income tax law and administration in a way which conflicts with appli-

cable principles of law established in such matters by this Court and other Circuits, and conflicts with decisions of this Court and other Circuits in ruling this case in a way contrary to controlling decisions of this Court and other Circuits under similar or identical facts, thereby tending to create such a substantial area of conflict, disorder and confusion in the field of federal income tax law and administration as to demonstrate the great public importance of this question and call for relief, which can come only through this Court exercising its power of supervision to review, clarify and harmonize the law on this question under its Writ of Certiorari.

We submit the opinion herein conflicts with such controlling decisions in the following particulars:

(1) Holding that the relevant facts in the earlier case of *John Paul Jones and Ruth J. Rubel Jones* v. *The United States of America*, 10 Cir., 387 F.2d 1004 (Appendix I, p. A53) and this case are identical and inseparable (Opinion pp. 2, 11, Appendix A, pp. A2, A8-A10).

(2) Holding that the legal issues and matters involved in said two cases are identical (Opinion pp. 6, 7, Appendix A, pp. A2, A7, A9).

(3) Holding that a recognized possibility of a different result in the trial of the second case did not prevent the application of collateral estoppel under the facts of this case (Opinion p. 11, Appendix A, p. A9).

(4) Holding that a failure to litigate and determine issues or points of fact which might have been litigated and determined in the earlier case justified entry of a judgment of collateral estoppel (although failure there to litigate and determine such issue and points was induced by their exclusion upon objections

by defendant, the party seeking collateral estoppel) (Opinion p. 10, Appendix A, pp. A8, A9).

(5) Holding that Respondent met its burden to prove the issues and points which Petitioners wished and attempted to litigate in this suit had already been fully tried, litigated and fully determined on the merits in the earlier suit, although the findings of the jury in the earlier case as stated in their verdict are ambiguous, uncertain and confusing so as to leave a reasonable doubt as to just what was in fact decided in the earlier case (Opinion p. 9, Appendix A, p. A9).

(6) The opinion and judgment of the Court of Appeals herein, if allowed to stand, would abolish the limitations and restrictions on use of collateral estoppel in federal income tax cases, thereby enlarging and broadening its field of applicability in defiance of controlling opinion of this court and other circuits.

(7) That the Court of Appeals has herein so far departed from the accepted and usual course of judicial proceedings in Federal income tax cases as to call for an exercise of this court's power of supervision, as the only available remedy.

(d) THE JUDGMENT BELOW WAS AFFIRMED SOLELY ON THE GROUND OF COLLATERAL ESTOPPEL, A DOCTRINE JUDICIAL IN ORIGIN AND NOT BASED ON ANY STATUTE

Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898.

(e) STATEMENT OF THE CASE

The District Court's jurisdiction was based on Title 26, U.S.C., Section 7402(a) and Title 28 U.S.C., Section 1346 (a)(1) of the U.S. Code. (A71-A72)

The trial of this case was a complete miscarriage of justice. The Court by four instructions 2, 3, 10, and 13 (R. 81, 85, 87-88), erroneously put on plaintiffs the unlawful burden (not a proper jury issue) of overcoming the presumption the Commissioner's assessment of the tax was correct, and then, upon objection of Government counsel, denied plaintiffs' counsel the right to proceed the only way they had to rebut such presumption (as they were not permitted to show the fluctuations of the Commissioner in his assessments (A4) by pointing out to the jury that every single witness for defendant on the merits was shown by the evidence to have had such present, or former, connections with Forrest Jones and his Agency, or Continental Casualty Company, or both (Parties who might be liable for the tax if plaintiffs were not) as to be expected to have adverse interests and be prejudiced against plaintiffs. The Trial errors were so gross and prejudicial as to be indefensible, as indicated by the footnote to the Court of Appeals' opinion on page 2 (A2), that the Court of Appeals bypassed them and ruled the case for respondent on collateral estoppel.

In 1953, Petitioner Mrs. Ruth J. Rubel Jones, hereinafter referred to as Mrs. Rubel to distinguish her from the several other Joneses in the case, was the owner of an Insurance Agency specializing in professional and associational group insurance for teachers and related personnel under contracts with Continental Casualty Company as underwriter.

In that year she sold her agency, worth not less than $400,000.00 and producing that year in commissions the sum of $97,311.76, to Forrest Jones, a former executive of

Continental and personal friend of its executives, recommended by them and the down payment totally financed by Continental.

The basic terms of the sale were a down payment of $50,000.00 (loaned Forrest by Continental), and deferred payments equal to 5% of the premiums collected by the Agency for a period of ten years to be forwarded to Mrs. Rubel through Continental for bookkeeping purposes and to afford a double audit. As part of the sales agreement, Mrs. Rubel was to assist in effecting transfer of the business to the new owner as part of the sale price.

As part of the transaction Continental required the execution of two instruments purporting to reduce the Agency commission by 5% of the premiums collected and purporting to employ Mrs. Rubel as consultant to Continental, when and if requested, for which she was to receive through Continental the 5% for ten years. She was told it was a mere technicality and that she would never be asked to perform such service, and the evidence is undisputed that she never was asked to, and never did perform any such service.

Petitioners' position is that the 5% paid her was part of the purchase price entitled to capital gains.

Continental's basic records were not altered to reflect any change in the rate of commission paid the agency on this business. That Company continued to report in its federal tax returns the same rate of commission expense as it had reported in its tax returns before the sale.

Petitioners' attorney and also their CPA approved the form of this transaction without warning them of any possible income tax complication and thereafter became, and still are, employed by this Forrest Jones Agency, and testified herein for defendant.

For the next two or three years the same CPA continued to make the federal income tax returns for Petitioners while also acting for the Forrest Jones Agency in taxation matters. He insisted on making the returns for the first two years on the basis of ordinary income for this 5%.

Later Petitioners changed tax men and filed a petition for refund which was granted and the tax assessed against the buyer, Forrest Jones (A4).

The Commissioner thereafter reversed himself, held the 5% to be Continental's money paid her for remaining available to serve it as consultant, released Forrest Jones and forced Petitioners to pay on the basis of ordinary income, thereby precipitating this series of litigation (Opinion p. 4, R. 15-19, 136, 331; A4).

The controlling issue in the case was whether the 5% paid Mrs. Rubel was Forrest Jones' money paid her as part of the purchase price and so entitled to capital gains treatment, or Continental's money paid her to remain available to render consultant service to it if called upon, which was never intended to be exercised by Continental, and never was.

The result up to date is that Forrest Jones has been enabled to purchase an Agency worth $400,000.00 with tax free money, except for the $50,000.00 down payment, and the sellers have had to pay on the basis of ordinary income when rightly and legally they were entitled to capital gains treatment.

Veteran United States District Judge Stanley, who tried the first case, overruled defendant's Motion for Judgment of Collateral Estoppel and filed a Memorandum Opinion (Appendix E, p. A29).

Judge Templar also overruled such motion in the trial of this case (Appendix F, p. A37).

The Court of Appeals tried to downgrade his opinion in two places in its opinion as being hesitant and uncertain (Opinion pp. 1, 7, Appendix A, pp. A1, A7).

With plaintiff's pleading in opposition to collateral estoppel and the interrogatories before him, Judge Stanley closed his opinion with these words (Appendix E, p. A36):

> "With these factors in mind, I believe, and hold, that the doctrine of collateral estoppel (or estoppel by judgment), as defined and applied in cases cited in this memorandum, has no application to the present litigation.
>
> IT IS ORDERED that defendant's motion for summary judgment be denied.
>
> Arthur J. Stanley, Jr.
> Chief Judge."

THE LEGAL MATTERS RAISED IN THE SECOND PROCEEDING FOR DIFFERENT TAX YEARS DO NOT INVOLVE THE SAME SET OF EVENTS OR DOCUMENTS AND THE SAME BUNDLE OF LEGAL PRINCIPLES THAT CONTRIBUTED TO THE RENDERING OF THE JUDGMENT IN THE FIRST CASE (Commissioner v. Sunnen, 333 U.S., l.c. 601-602)

(See Petitioners' Reply, Appendix D, p. A22.)

(a) Difference in the Evidence and Documents in the Two Cases

1. The first case involved income tax liability for the tax years 1956 and 1957, while this suit involves income tax liability for the years 1958, 1959, 1960, and 1961.

2. During the tax years 1956 and 1957, Mrs. Rubel was rendering services to the buyer of her agency in compliance of her sales agreement to aid him in effecting a smooth transfer of the business. The evidence is undisputed that thereafter and during the period covered by this case she rendered no services of any kind, either to the buyer or underwriter.

3. In the trial of the first case, upon objection of the Government Counsel, the Court systematically excluded the evidence as to the year 1958, and subsequent years, which are the subject of this suit.

4. In the first case, upon objection of Government Counsel, the Trial Court excluded five exhibits offered by the plaintiff (387 F.2d l.c. 1007) (Appendix I, pp. A59-A61) in the nature of inter-office correspondence of the Underwriter Continental Casualty Company recognizing the 5% payments as the money of the buyer in accordance with plaintiff's contention (the very heart and crux of the case) and the Court of Appeals held such exclusion not reversible error because the reason for their admission was not made clearer to the Trial Court (387 F.2d l.c. 1007). Two of such exhibits, Nos. N and P, are set out in the Appendix at pages A64, A66 as being typical of such exhibits.

Said five exhibits were admitted in evidence in this case. They constitute contemporary documentary evidence created by Continental in the regular course of business prior to the beginning of any litigation in this matter. Continental as party to the sales contracts and Forrest Jones and his Agency as Buyer, had, and may still have, possible federal income tax liability on this 5% fund (R. 136, 331), creating in them interests adverse to plaintiffs in this litigation and accounting for the fact every witness on the merits, testifying in this case for the Government,

was an employee, former employee, pensioner, supplier, or partisan of Continental or Forrest Jones and his Agency, or both.

These exhibits are therefore in the nature of admissions against interest of Continental and Forrest Jones and his Agency, constituting documentary evidence of higher value and greater probative force than the oral evidence on this issue in the first case.

In the case of *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395-396, 68 S.Ct. 525, 542, 92 L.Ed. 746, this Court in evaluating oral testimony of witnesses as against documents as here said:

> "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

The erroneous ruling of the Court of Appeals that the facts of the two cases are identical and inseparable for purposes of collateral estoppel (Opinion, pp. 7-10, Appendix A, pp. A2, A8-A10), does not deal fairly with the documentary evidence excluded in the first case, but included in the second (see pages 9-13 of this Petition), and is answered by the case of *Thurber Corporation* v. *Fairchild Motor Corp.*, 269 F.2d 841, where it is said (l.c. 844):

> "[3] The effect of this exclusion cannot be fully estimated. We cannot now determine what the jury might have done had it known what it was not permitted to know. But the matters excluded were of such great significance and pertinence to the case at

hand that we cannot say that the District Court's ruling did not 'affect the substantial rights of the parties,' 28 U.S.C.A. §2111, or that it constituted mere 'harmless error,' F.R.Civ.P. 61."

5. In the exercise of its wide discretion in the first case the Court refused to receive expert testimony of plaintiffs' expert David Kosh on the reasonable market value of the Agency at the time of sale and there was no opinion evidence of such value in that case.

In this case, Mrs. Rubel, as founder, operator, and owner at the time of sale testified that the reasonable market value of the Agency at the time of sale was "not less than $400,000.00 cash."

The importance of this difference is pointed up by the trial contention of the Government in both cases that the total purchase price of the Agency was $50,000.00, although in the very year of the sale the Agency produced $432,497.00 in annual premiums, paying the Agency in commissions for that year the sum of $97,311.76, matters of great importance on the issue of economic reality submitted in this case, but not submitted in the first.

6. Exhibit E-1 (Appendix J, p. A64) offered and received in evidence in this case was offered in the first case but refused admission upon Government objection (Vol. 1, 1956-57; Tr. 499-503).

Although not referred to in the Court of Appeals' opinion in the first case (387 F.2d 1004-1008) this exhibit is a letter from Paul S. Fisher, Superintendent, Association Group Division of the Underwriter directed to Mrs. Rubel in the regular course of Continental's business, admitting the 5% payments to Mrs. Rubel (5% of Forrest Jones' Agency premium income) was the money of the buyer,

Forrest Jones, providing strong probative evidence in support of plaintiffs' claim the 5% was part of the purchase price, and evidence of higher character and greater probative force than the oral testimony in the first case tending to prove such fact, as pointed out in Paragraph 4 above.

7. In this case there was evidence (lacking or very skimpy in the first case) of teachers and others testifying personally in court as to the exceptionally good relations between Mrs. Rubel and the teachers groups and their enthusiastic dependence on, and confidence in, her, matters of great importance on the issues of good will and evaluation of the Agency.

8. The greatly increased amount and greater probative character of the testimony on value of the Agency and good will admittedly raised jury issues in this case and were submitted, although held insufficient and not submitted in the first case.

(b) Differences in the "Bundle of Legal Principles That Contributed to the Rendering of the Judgment" in the First Case (68 S.Ct., l.c. 720, 333 U.S., l.c. 600)

1. The Trial Court refused to submit the issue of Good Will in the first case (387 F.2d l.c. 1008) and the Court of Appeals affirmed because of the "tenuous basis" for such an instruction and insufficiency of the offer.

With additional evidence on that issue in this case, and a proper request, the Court did submit that issue in the damage instruction buried as number 7 in a list of items to be considered on the issue of damages.

2. The very important issue of economic reality (based largely on the Government's basic defense that the total purchasing price of this Agency was only $50,000.00

in a year when it had a reasonable market value of $400,000.00 and the agency actually received in gross commissions the sum of $97,311.76) was not submitted in the first case but was submitted in this case in the damage instruction, likewise buried in a list of items as number 11 to be considered on the issue of damages.

3. Documentary evidence of the highest probative force and convincing power was refused admission in evidence in the first trial but found to be competent, relevant and admissible in this trial, as pointed out herein above on pages 10 and 11 of this petition.

4. The facts litigated and determined in the prior case were only that Mrs. Rubel received money from Continental Casualty which was ordinary income for services to someone not named; leaving undetermined the material and controlling issues of whose money it was, for what services and for whom such services were rendered.

In the case of *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568-569, 71 S.Ct. 408, 414, 95 L.Ed. 534, after pointing out that a prior criminal conviction might work an estoppel in a civil case, the Court said (l.c. 414):

> "Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution. See Frank v. Mangum, supra, 237 U.S. at page 334, 35 S.Ct. at page 590; United States v. Meyerson, D.C.S.D. N.Y. 1928, 24 F.2d 855, 856."

In the case of *Eagle Lion Studios* v. *Loews, Inc.*, 2 Cir., 248 F.2d 437, the Court said (l.c. 444):

> "But 'a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact, not actually litigated

and determined in the first action.' Restatement, Judgments § 68 (1942)."

In the case of *Exhibitors Poster Exch., Inc.* v. *National Screen Serv. Corp.*, 5 Cir., 421 F.2d 1313, the Court said (l.c. 1319):

> "The doctrine is classically stated by Mr. Justice Field in Cromwell v. County of Sac, 1877, 94 U.S. 351, 24 L.Ed. 195 when he says that in 'a second action between the same parties * * * upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' At 94 U.S. 353, 24 L.Ed. 198. It forecloses inquiry only as to those issues which were necessarily determined. United States v. Burch, 5 Cir., 1961, 294 F.2d 1, 5."

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Although purporting to follow and apply the controlling principles of the landmark opinion of this Court in the case of *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 92 L.Ed. 898, 68 S.Ct. 715 (Opinion Court of Appeals pp. 2 and 11, Appendix A, pp. A1, A10) and attempting to sustain that position with a strained and belabored argument, we submit the many material conflicts of this case with the *Sunnen* opinion, and opinions of other circuits, are erroneous and tend to throw confusion into federal income tax law and administration so as to create a fertile basis for litigious confusion, as we shall attempt to demonstrate.

1. The Court of Appeals first erroneously holds the "relevant, tax-operative facts are identical and inseparable for purposes of collateral estoppel" in the two cases (Opinion pp. 2, 7, 11, Appendix A, pp. A2, A8-A10).

We have pointed out the many relevant and important factual differences in this later case at pages 9-15 of this petition. Such ruling is in direct conflict with the *Sunnen* case:

> "Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment (Citing authorities)." *Sunnen*, 333 U.S. l.c. 601-602.

The important documents excluded in the first case could not "have contributed to the rendering of the first judgment."

> "If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation." (*Sunnen*, 333 U.S. l.c. 600).
>
> "If the relevant facts in the two cases are separable, even though they are similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." (*Sunnen*, 333 U.S. l.c. 601).

Apparently recognizing the weakness of this position, the Court of Appeals finally erroneously expressed the opinion the different facts in this case were not relevant or material (Opinion pp. 8, 9, 10, 11, Appendix A, pp. A7-A10). This is answered at pages 9-15 of the Petition to which we refer the Court.

2. The Court of Appeals erroneously holds "the legal issues presented in the two cases are essentially identical. We think so." (Opinion p. 7, Appendix A, p. A6). We have pointed out the material difference in legal issues in the two cases at pages 13-15 of this petition.

Such ruling of the Court of Appeals is in direct conflict with the *Sunnen* case:

> "And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. *Tait* v. *Western Md. R. Co.*, supra. If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation." *Sunnen*, 333 U.S. l.c. 600.

In the case of *Lawler* v. *National Screen Service Corp.*, 349 U.S. 322, 326-327, 99 L.Ed. 1122, 75 S.Ct. 865, 868, this Court held the fact the two causes of action were "essentially the same" was insufficient upon which to base a judgment of *res judicata*.

3. The Court of Appeals erred and brought its opinion into direct conflict with the *Sunnen* case in holding that, although it recognized the possibility of a different result in trial of the later case, that was insufficient to defeat collateral estoppel (Opinion p. 11, Appendix A, p. A9). This is in direct conflict with the *Sunnen* case:

> "Thus in the earlier litigation in 1935, the Board of Tax Appeals was unable to bring to bear on the assignments of the 1928 contract the full breadth of the

ideas enumerated in the Clifford-Horst series of cases. And, as we shall see, a proper application of the principles, there developed might well have produced a different result, such as was reached in the Tax Court in this case in regard to the assignments of the other contracts. Under these circumstances collateral estoppel should not have been used by the Tax Court in the instant proceeding to perpetuate the 1936 viewpoint of the assignments." *Sunnen*, 333 U.S. l.c. 607.

Here Petitioners were unable to bring to bear on the issues the important documents excluded upon defendant's objection or have the benefit of the legal matters pointed out at pages 9-15 of this petition.

Such holding is likewise in conflict with the Ninth Circuit in the case of *Parker* v. *Westover*, 9 Cir., 221 F.2d 603, following the *Sunnen* case where the court said (l.c. 606):

> "The possibility of a different verdict because of the introduction of evidentiary matters different from those before a court and jury in a prior case is insufficient to surmount the danger of collateral estoppel in an income tax case."

4. The Court of Appeals erred in holding the failure to litigate certain issues and points of fact in the earlier case, which might have been litigated there, justified the application of the drastic remedy of collateral estoppel in this case (Opinion pp. 11, 12, Appendix A, pp. A8, A9), where petitioners attempted to litigate such matters in the earlier case, but were prevented from doing so upon objection of defense counsel, thereby bringing the opinion herein into direct and irreconcilable conflict with the *Sunnen* Opinion of this Court.

5. The court erred in holding the prior case, although admittedly poorly tried (Opinion pp. 10 and 11, Appendix A, pp. A8, A9), resulting in the exclusion of important documentary and oral evidence and non-submission of issues of economic reality and good will upon objections of defense counsel (Typewritten transcripts of the proceedings of the 1956, 1957 trial: Vol. 1, pp. 144, 145, 251, 252, 264, 268, 328, 449, 451, 452; Vol. 3, pp. 59, 66, 67, 71, 75, 80; Vol. 4, pp. 63, 64, 65; Vol. 5, p. 799. Tr. Pre-trial, Jan. 29, 1964, pp. 11 and 12) constituted that type of full and fair opportunity to litigate the issues and resulted in such a complete adjudication on the merits as to justify application of the doctrine of equitable estoppel, brought the opinion and judgment of the Court of Appeals into direct and irreconcilable conflict with controlling opinions of this Court, opinions of other United States Courts of Appeal and in conflict wih established principles of law set forth in the following cases:

> "(3) The party seeking to invoke the doctrine of estoppel by judgment or collateral estoppel must show (1) that the issue which his opponent wishes to litigate has already been completely adjudicated ***." *Hellenic Lines* v. *The Exmouth*, 2 Cir., 253 F.2d 473, 477.

In the case of *United States* v. *International Building Company*, 345 U.S. 502, 506, 97 L.Ed. 1182, 73 S.Ct. 807, the Court said (73 S.Ct. l.c. 809):

> "But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second

proceeding which were actually presented and determined in an earlier suit. See Commissioner v. Sunnen, supra, 333 U.S. at page 598, 68 S.Ct. at page 719."

In the case of *Rachal* v. *Hill*, 5 Cir., 435 F.2d 59, the Court said (l.c. 62):

"While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case. See United States v. Webber, 3 Cir., 1968, 396 F.2d 381, 389; Graves v. Associated Transport, Inc., 4 Cir., 1965, 344 F.2d 894 (Virginia law)."

"But where the second cause of action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon which the determination of which the finding or verdict was rendered.' (Citing authorities)." (*Sunnen*, 333 U.S. l.c. 597-598).

In the case of *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U.S. 661, 671, 64 S.Ct. 268, 274, 88 L.Ed. 376, the Court said:

"The case is then governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is res judicata

not as to issues which might have been rendered but 'only to those matters in issue or points corroborated, upon the determination of which the finding or verdict was rendered.' *Cromwell* v. *County of Sac.*, 94 U.S. 351, 353, 24 L.Ed. 195."

Furthermore, having by its objection prevented such full and fair adjudication on the merits, Respondent here is in no position to take advantage of such exclusions by the trial court.

In the case of *R. G. Stearns Co.* v. *United States*, 291 U.S. 54, 61-62, 78 L.Ed. 647, 54 S.Ct. 325, where the Court said (54 S.Ct. l.c. 328):

"The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him, in effect: "This is your own act, and therefore you are not damnified."'

• • •

"A suit may not be built on an omission induced by him who sues. Swain v. Seamens, 9 Wall. 254, 274, 19 L.Ed. 554; United States v. Peck, 102 U.S. 64, 26 L.Ed. 46; Thomson v. Poor, 147 N.Y. 402, 42 N.E. 13; New Zealand Shipping Co. v. Societe des Ateliers, [1919] A.C. 1, 6; Williston, Contracts, Vol. 2, §§ 689, 692."

See to like effect: *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U.S. 252, 30 S.Ct. 78, 54 L.Ed. 179, 185; *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-233, 3 L.Ed.2d 770, 79 S.Ct. 762.

It is likewise in conflict with the opinion of the Fourth Circuit in the case of *Fairmount Aluminum Co.* v. *C.I.R.*, 4 Cir., 222 F.2d 622, where the Court said (l.c. 625):

> "'A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form. Swift v. McPherson, 232 U.S. 51, 34 S.Ct. 239, 58 L.Ed. 499; Clegg v. United States, 10 Cir., 112 F.2d 886; 30 Am. Jur., p. 944; 49 C.J.S., Judgments, § 8, p. 33; 27 Words and Phrases, Merits, pp. 146-147.'"

Neither trial measured up to this. See *Foman* v. *Davis*, 371 U.S. 178, 181-182, 9 L.Ed.2d 222, 83 S.Ct. 227, 230.

See to like effect: *Costello* v. *United States*, 365 U.S. 265, 288, 5 L.Ed.2d 537, 81 S.Ct. 544, 545.

Exclusion of the evidence and nonsubmission of the issues in the first case were matters of practice and procedure and not a decision on the merits as to such facts and issues.

6. The Court of Appeals erred in holding the material and controlling issues in this case (Opinion pp. 1, 7, 9, Appendix A, pp. A3, A7) as to whether this 5% fund paid to Mrs. Rubel was the money of the buyer Forrest Jones paid to her through Continental Casualty Company as part of the purchase price of the Agency which included her services in effecting a transfer of the business as Petitioners contend, or was Continental's money paid her for being available to it for services as a consultant, if called upon, as Respondent contends, were "identical in all respects with the matters decided in the first proceeding" (*Commissioner* v. *Sunnen*, 333 U.S. l.c. 599-600) where the determination by the verdict in the first case was (Appendix K, p. A69):

"We, the jury, find the amounts received by Mrs. Ruth J. Rubel Jones from Continental Casualty Company (that is $36,909.08 for 1956 and $49,172.21 for 1957) ordinary income received for services which she rendered or agreed to render and we return our verdict for the plaintiff, United States of America.

Charley Hall,
Foreman."

This verdict did not distinctly determine the important and material matters of whose money, what service and for whom, and was ambiguous and uncertain on its face, the evidence being undisputed that during that period Mrs. Rubel was rendering service to Forrest Jones in effecting transfer of the business but was not called upon to render, nor did she render, any consultant service to Continental, in that the verdict findings left undetermined whose money was paid to Mrs. Rubel, for what service and to whom such service was rendered, thereby bringing this opinion into direct and irreconcilable conflict with the controlling opinions of this Court and with other Circuits in the following cases:

In *Commissioner* v. *Sunnen*, 333 U.S. l.c. 600, this Court said:

"If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation."

The Court of Appeals erroneously puts its emphasis on what was submitted in the first case rather than what was determined in that case which has to be the determining factor.

The only determination essential to such limited findings by the jury was that Mrs. Rubel received money from

Continental for service of some kind to someone, not designated, which is clearly insufficient. *Yates* v. *United States*, 344 U.S. 298, 336, 77 S.Ct. 1064, 1086, 1 L.Ed.2d 1356.

In the case of *Basista* v. *Weir*, 2 Cir., 340 F.2d 74, the Court said (l.c. 82):

> "There is no doubt, however, that, at best, the present Quarter Sessions judgment against Basista is ambiguous and therefore must be treated as insufficient to support collateral estoppel. Russell Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 (1955)."

In the case of *Russell* v. *Place*, 94 U.S. 606, 24 L.Ed. 214, the Court said (94 U.S. l.c. 610):

> "If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence."

The test of what was actually determined in the first case was the verdict of the jury set out aforesaid.

In the *Sunnen* case, 333 U.S. l.c. 598, the Court said:

> "But, if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit."

In the case of *Moore* v. *United States*, 344 F.2d 558, the District of Columbia Court of Appeals said (l.c. 560):

> "Since appellant failed to meet his burden of showing that the fact in question was determined by the prior judgment, the trial court properly rejected his collateral estoppel argument."

In the case of *McNellis* v. *First Fed. Sav. & Loan Ass'n of Rochester, N.Y.*, 2 Cir., 364 F.2d 281, the Court said (l.c. 257):

> "Finally, although the principles of *res judicata* should not be frugally applied, cf. United States v. Munsingwear, Inc., 340 U.S. 36, 38 71 S.Ct. 104, 95 L.Ed. 36 (1950), a reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue. Cf. Cleary, Res Judicata Reexamined, 57 Yale L.J. 339 (1948)."

7. The Court of Appeals erred in holding (Opinion p. 9, Appendix A, p. 47):

> "The issue whether payments made under the terms of the five per cent agreement were ordinary income or capital gains was squarely submitted to the jury in the prior action, and the taxable character of these payments as ordinary income was conclusively established by the verdict."

Such fact was not squarely determined by the jury verdict as pointed out above (pp. 22-24) indicating that it may not have been "squarely submitted", as assumed.

Furthermore, even assuming such to be the fact, the ruling was erroneous and the new and different evidence of higher character and different legal issues as pointed out herein above at pages 9-15 preclude application of collateral estoppel, regardless.

Such ruling is in direct conflict with the *Sunnen* case holding:

> "But if the relevant facts in the two cases are separable, even though they may be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. * * *

> "Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." (333 U.S. l.c. 601).

The Court of Appeals (Opinion p. 11, Appendix A, p. A9) cites the case of *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 453 (5th Cir. 1971), Cert. denied, 404 U.S. 940, as a stepping stone to overrule the *Sunnen* case and free this tax case from the established limitations and restrictions on use of collateral estoppel in federal income tax cases, and putting such cases at large and under general law.

In the first place that was not a tax case but an interpleader suit to determine rights of the parties in a fund.

That case was controlled by New York law and not federal law, as here. It recognized the right of "a 'full and fair opportunity' to litigate the issue in the prior suit." 444 F.2d l.c. 461. The Court there pointed out (444 F.2d l.c. 462):

> "Moreover, the court below noted, and we note on this appeal that CTI nowhere complained that it was in any way inhibited from making additional proof on the issues in New York."

In this case both the trial court and Court of Appeals noted such complaints, by petitioners set out herein at pages 9-15. The Court in the *Talcott* case noted (444 F.2d 462):

> "It is this potential for remote application that has given the doctrine of collateral estoppel a bad reputation and that has prompted the remark that collateral estoppel is 'an extremely dangerous instrument.' "

CONCLUSION

WHEREFORE, your Petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Tenth Circuit, reversing and remanding this case with directions to that Court to set aside its opinion and judgment herein and proceed in this matter in accordance with the applicable principles of law as established in the Opinion of this Court in the case of *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898, and other Opinions of this Court and Opinions of other Circuit Courts of Appeal cited in this petition.

WALTER A. RAYMOND

KENNETH C. WEST

CERTIFICATE OF COUNSEL

The undersigned, Walter A. Raymond, counsel of record for Petitioners, hereby certifies that the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit is submitted in good faith and is believed to be meritorious.

WALTER A. RAYMOND

APPENDIX A

OPINION

(Filed August 21, 1972)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY 1972 TERM

No. 71-1386

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court
for the District of Kansas
(D. C. Nos. KC-2351 and KC-2898)

Walter A. Raymond, Kansas City, Missouri (James Baska, Kansas City, Kansas, and Kenneth C. West, Kansas City, Missouri, with him on the brief), for Appellants.

Issie L. Jenkins, Attorney, Tax Division, Department of Justice, Washington, D. C. (Of Counsel: Robert J. Roth, United States Attorney, Scott P. Crampton, Assistant Attorney General, and Meyer Rothwacks and Bennet N. Hollander, Attorneys, Tax Division, Department of Justice, Washington, D. C., with her on the brief), for Appellee.

Before MURRAH, SETH and BARRETT, Circuit Judges.

MURRAH, Circuit Judge.

This is the second effort of Ruth J. Rubel Jones and her husband John Paul Jones to have certain annual payments, received by Mrs. Jones under the terms of a written agreement, treated as capital gains for tax purposes. In the earlier case a jury determined that the payments received by Mrs. Jones in the 1956 and 1957 taxable years were ordinary income. We affirmed the judgment entered on that verdict. *See* Jones v. United States, 387 F.2d 1004 (1967), *cert. denied*, 392 U.S. 927 (1968). The present action is concerned with payments received by Mrs. Jones under the same contractual arrangement for the taxable years 1958, 1959, 1960 and 1961.

The government pleads the prior judgment as an estoppel to adjudication of the taxpayers' present claim, and made a pretrial motion for summary judgment on those grounds. Apparently out of an abundance of caution, the trial court denied the summary judgment motion, as well as the government's on-trial motion for a directed verdict, and submitted the case to the jury on the same issue presented and decided in the prior case. The jury again returned a verdict in favor of the United States, finding that the payments in question were taxable as ordinary income rather than capital gains. This appeal is from the judgment on the jury's verdict. We affirm the judgment without reaching the alleged trial errors raised on appeal,[1]

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1. The taxpayers contend that the trial court committed prejudicial and reversible error by: (1) instructing the jury as to the presumptive correctness of assessments made by the Commissioner of Internal Revenue in such a manner as to give that presumption evidentiary value; (2) giving and refusing to give various other instructions, the cumulative effect of which was to deny them a fair trial; and, (3) not allowing counsel to comment, in argument to the jury, on possible tax liabilities of the government's witnesses.

for we are convinced that the prior judgment on the 1956 and 1957 tax years is conclusive of the claims asserted here for subsequent tax years.

We arrive at this conclusion fully cognizant of the rule under which collateral estoppel is strictly and sparingly applied in tax cases involving liability for different years. *See* Jones v. Trapp, 186 F.2d 951, 953 (10th Cir. 1950); Gillespie v. Commissioner of Internal Revenue, 151 F.2d 903, 906 (10th Cir. 1945), *cert. denied*, 328 U.S. 839. The doctrine is applicable only when an issue identical to that presented in the second case has been raised and fully adjudicated under identical and inseparable relevant facts in a prior action between the same parties involving a different tax year. *See* Commissioner v. Sunnen, 333 U.S. 591 (1948); Tait v. Western Md. Ry. Co., 289 U.S. 620 (1933). We recite the basic facts, fully set forth in our former opinion, for convenience and continuity and to show the inherent similarity of the two cases. *See* Jones v. United States, *supra* at 1005-1006.

Prior to 1953, Ruth Jones was the owner of an insurance agency which specialized in accident and health insurance coverage for teachers' groups in Kansas and Missouri. Continental Casualty Company was the underwriter of the group insurance and paid Ruth 22-1/2% of the premiums as commission on group policies which she sold. In 1953, Ruth commenced negotiations with Forrest T. Jones (no relation to the taxpayers) for the sale of her insurance business. Continental apparently played an important role in these negotiations and loaned Forrest the necessary funds for the purchase. The agency was incorporated in furtherance of the sale plans and subsequently Ruth entered into an agreement to sell all of her stock in the agency to Forrest for the sum of $25,000. Approximately three years later the agreement

of sale was amended to show that the actual purchase price agreed upon by the parties was $50,000.

Contemporaneously with the agreement of sale, Ruth entered into the so-called "five per cent agreement" with Continental. Under the terms of this instrument Ruth agreed for a period of ten years "to represent, act and serve as a consultant for Continental on matters relating to the soliciting, negotiating, underwriting and placing of Teachers' Group Insurance as shall be requested by Continental." Continental, in turn, agreed to pay Ruth "for said services a sum equal to 5% of the premiums on any insurance written through Continental by Forrest T. Jones or the Ruth J. Rubel Agency, Inc." Forrest and Ruth also entered into a "guaranty" agreement, whereby Forrest guaranteed to Ruth that the payments received by her under the "five per cent agreement" would not be less than $15,000 per year, and that in the event the payments did not equal that amount in any three consecutive years Ruth would have an option to purchase all of the capital stock of the agency for the sum of $1.00.

Ruth and Paul Jones filed joint income tax returns for the years 1956 and 1957, reporting the payments received by Ruth from Continental pursuant to the five per cent agreement as ordinary income. In 1960 the taxpayers filed a claim for refund, asserting that the amounts reported as ordinary income in the 1956 and 1957 returns were actually deferred payments on the total purchase price of the insurance agency and, thus, taxable as long-term capital gains. On that theory the Internal Revenue Service initially allowed the refund claim in part, but subsequently changed its position, determining that the payments were properly taxable as ordinary income, and instituted the first suit to recover the amount of the refund from the taxpayers.

Ruth and Paul also filed a refund claim for taxes on the payments received during 1958, which had also been reported as ordinary income in their joint return for that year. Again, the I.R.S. originally allowed the refund in part, but later reversed itself and assessed a deficiency. The taxpayers paid this assessment and subsequently filed a second refund claim for the 1958 taxes, which was disallowed.

On their joint returns for 1959, 1960 and 1961, Ruth and Paul reported the payments received during those years as long-term capital gains; thereafter, deficiencies were assessed against them. After paying the assessments, the taxpayers filed another claim for refund, which was also disallowed. Ruth and Paul then instituted two suits, which were consolidated in the present action, claiming to be due refunds totaling approximately $114,000 plus interest, for the years 1958 through 1961.

On trial of the first case the taxpayers argued that the substance of the 1953 transactions was the sale of Ruth's insurance agency to Forrest; that the $50,000 to be paid under the amended agreement of sale was merely a down payment; and, that the five per cent payments were actually installment payments on the total purchase price. The government, on the other hand, contended that Ruth had merely sold her stock in the incorporated agency pursuant to the agreement of sale for a total purchase price of $50,000, and that the five per cent agreement constituted a separate agreement between Ruth and Continental for consulting services. The issue submitted to the jury was whether the amounts received by Ruth from Continental in 1956 and 1957, pursuant to the terms of the five per cent agreement, were part of the sale price of the insurance agency, hence capital gains, or compensation for services rendered, hence ordinary income.

After judgment in the first case, the government made its summary judgment motion on grounds of collateral estoppel in the present case. As we have seen, the trial court denied the motion and submitted the case for trial to a jury. The taxpayers' contentions in the present action were the same as those raised in the prior case and were presented to the jury in substantially the same manner. It is, thus, evident that this claim is between the same parties as the prior case; arises under the same contractual arrangement; and involves the same contractual payments, except for different taxable years. The applicable tax laws have not changed. It is manifestly clear, therefore, that the legal issues presented in the two cases are essentially identical. The only question then is whether the relevant, tax-operative facts are identical and inseparable for purposes of collateral estoppel. We think so.

In rejecting application of collateral estoppel the trial court was apparently influenced by certain alleged dissimilarities in the tax-operative facts of the two cases. First, there was the fact—alluded to in the first case, but more fully developed at the second trial[2]—that Ruth Jones actively participated in business of the insurance agency during the years involved in the first case, whereas she took no active part in agency affairs during the taxable years here in suit. The taxpayers earnestly contend that this dissimilarity justifies, indeed compels, different tax

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2. In denying the summary judgment motion, the trial judge noted that Ruth had testified briefly on this point under cross-examination at the first trial, but seemed to think that while such evidence was only of tangential relevance with regard to the 1956 and 1957 tax years, it might have direct bearing with regard to 1958 and subsequent years if further elaboration was permitted at a second trial. "However, as long as the jury in the prior trial has this same evidence before it, the stress placed upon such evidentiary facts by counsel or the court does not matter. This is not a 'subsequent modification of the significant facts.' Commissioner v. Sunnen, 333 U.S. at page 599. It is only a change in emphasis." Parker v. Westover, 221 F.2d 603, 605 (9th Cir. 1955).

treatment for the five per cent payments received during the various taxable years. Assuming this factual dissimilarity to be true, we think it completely irrelevant to the legal issue presented in both cases and conclusively adjudicated in the proper case; it is simply of no tax consequence.

The five per cent agreement provides that Ruth is to receive the payments for acting as a consultant on agency business. And since the payments were continued after she ceased acting as a consultant, it could ordinarily be inferred that those payments were actually made and received for some other reason—*e.g.*, as payments on the purchase price of the going business. We think it highly significant, however, that the five per cent agreement also stated that Continental was required to continue making the payments ". . . regardless of [Ruth's] inability or incapacity to fulfill her obligations hereunder stated and regardless of her death, provided that such obligations have been satisfactorily performed by [Ruth] for a period of two years from the date hereof and prior to any such inability or incapacity or death." Thus, having admittedly satisfied the condition precedent by serving as a consultant for a period of two years from September, 1953, Ruth was entitled to receive the five per cent payments under the terms of the agreement even though no services were actually rendered in the taxable years in question. The issue whether payments made under the terms of the five per cent agreement were ordinary income or capital gains was squarely submitted to the jury in the prior action, and the taxable character of those payments as ordinary income was conclusively established by the verdict. Once the taxable character of payments received pursuant to a contract has been judicially determined, that character cannot be altered as long as the payments continue to be received

in accordance with the contract terms and there is no change in the contract or the applicable tax laws. *See* Gillespie v. Commissioner of Internal Revenue, *supra* at 906-907.

For substantially the same reason, we think it completely irrelevant that subsequent to 1958, the payments received by Ruth included five per cent of the gross premiums on accounts not originated by her and as to which she had performed no services. The agreement provided that the annual payments would consist of "5% of the premiums on any insurance written through Continental by Forrest Jones or the Ruth J. Rubel Agency, Inc. . . ." It did not require the premiums to be on accounts which Ruth had personally originated or serviced. The payments in question were, therefore, made pursuant to the contract terms, and the tax treatment to be accorded such payments was conclusively determined in the prior case.

The trial court also relied to a large extent on the taxpayers' assertions that evidence excluded at the first trial would be submitted in admissible fashion in this case so as to present more clearly the issues to be determined and allow them to be more fully litigated, thus creating the distinct possibility of a different verdict. This evidence was primarily intended to establish the agency's true value at the time of the sale and to show that the payments received by Ruth were actually made from funds belonging to Forrest rather than Continental.

Evidence of this type is not the result of a different factual situation or changed circumstances. It is, instead, historical in nature and could have been admitted at the first trial if properly submitted. If the taxpayers' case was not effectively presented at the first trial it was their fault; affording them a second opportunity in which to

litigate the matter, with the benefit of hindsight, would contravene the very principles upon which collateral estoppel is based and should not be allowed. *See* Tait v. Western Md. Ry. Co., *supra* at 625-626; Fairmont Aluminum Co. v. C.I.R., 222 F.2d 625, 627 (4th Cir. 1955), *cert. denied*, 350 U.S. 838; Jones v. Trapp, *supra* at 954. "To be sure, we recognize that whenever a court considers applying the doctrine of collateral estoppel, there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence. Without more, however, this question is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel—that litigation of issues at some point must come to an end." James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 463 (5th Cir. 1971), *cert. denied*, 404 U.S. 940.

After examining and comparing the records in both cases, we are firmly convinced that the relevant facts are identical and inseparable, and that this case clearly comes within the narrow guidelines for application of collateral estoppel in tax litigation. *See* Sunnen v. Commissioner, *supra*. We are persuaded, moreover, that application of the doctrine will result in no unfairness to the taxpayers. Even though the trial court's reluctance to grant summary judgment is understandable,[3] the motion for directed verdict was made in the face of all the evidence pertaining to the alleged factual dissimilarities and clearly should have been granted. The judgment in favor of the United States is affirmed for that reason.

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3. Moreover, in these circumstances an order denying a summary judgment motion is not, in itself, appealable. *See* Goodyear Tire & Rubber Company v. Jones, 433 F.2d 629, 632 (10th Cir. 1970); Boyles Galvanizing & Plating Co. v. Hartford Acc. & Ind. Co., 372 F.2d 310, 312 (10th Cir. 1967); Annot., 15 A.L.R.3d 899, 922 (1967).

APPENDIX B

APPELLANTS' PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 71-1386

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Come now the Appellants above named and respectfully petition this Honorable Court to set aside the Judgment and Opinion entered herein against them and grant them a rehearing because of material facts overlooked or misapprehended, controlling legal principles misapprehended and misapplied and material and prejudicial conflicts of opinion with the Supreme Court of the United States and other United States Courts of Appeals as hereinafter pointed out. (Appellants' Main Brief is designated "M.B." and their Reply Brief "R.B."):

1. After having given the case of *Commissioner* v. *Sunnen*, 333 U. S. 591, 68 S. Ct. 715, 92 L. Ed. 898, recognition as announcing the controlling law in this case, and although noting the rule of collateral estoppel does have

limitations, the Court proceeds to handle the term "identical" so loosely as to ignore, or misconstrue and fail to apply, those limitations and enlarge and broaden the legitimate scope of this remedy by ignoring limitations laid down in the *Sunnen* case, which are the law applicable to this case, among which are:

A. "* * * the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted *upon the determination of which the finding or verdict was rendered.*' (citing cases)" (Emphasis ours)

Sunnen case, 333 U. S. 598, See Paragraph 2 Hereinafter.

B. "Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." 333 U. S. 601-602.

See Paragraphs 3, 4 Hereinafter.

C. "And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal changes. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." 333 U. S. 601.

See Paragraphs 3, 4 Hereinafter.

In so ruling as to free this case from the limitations set out in the *Sunnen* case, this Court brings its opinion and judgment herein into direct and irreconcilable conflict with the controlling decision in the *Sunnen* case, as hereinafter pointed out.

2. The Court here erroneously applied the collateral estoppel doctrine to a situation based on evidence and issues which might have been litigated in the first case (Opinion 10, 11) had they not been eliminated upon objection of the Commissioner's counsel (387 F. 2d 1007-1008) and which having been excluded by the trial court could not have been "matters in issue or points controverted *upon the determination of which the finding or verdict was rendered*" (Emphasis ours) in the first case. (333 U. S. 598)

In holding Appellants responsible for this omission and penalizing them for the failure to have such facts and issues determined (Opinion 10, 11) this Court has overlooked and failed to consider the fact that such facts and issues, having been eliminated upon objections of the Commissioner's counsel, should now preclude the Commissioner from benefiting from such position and contention (affirmed by this Court, Opinion 10, 11) that it was plaintiff's fault that such facts and issues had not been litigated in the first case. (R.B. 7, 8)

In so ruling this Court brought its opinion herein into direct and irreconcilable conflict with the controlling decision of the Supreme Court in *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, 61, 54 S. Ct. 325, 78 L. Ed. 647, where the Court said: (54 S. Ct., l.c. 328)

> "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the nonperformance

which he has himself occasioned, for the law says to him, in effect: "This is your own act, and therefore you are not damnified." ' "

The ruling herein is also in direct conflict with the case of *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, 30 S. Ct. 78, 54 L. Ed. 179, the Court in considering an issue of res judicata or collateral estoppel, said: (54 L. Ed. 185)

> "Testimony in regard to it was excluded upon the objection of the chemical company, and there is support for the contention that the company is estopped to urge that a defense which was excluded upon its objection was involved in the action and concluded by the judgment."

This point was once raised by the trial judge in answer to this argument of the Commissioner's Counsel and, although briefed by Appellants (R.B. 7, 8), was erroneously overlooked and not considered by this Court.

We submit this is an exceptional "factor invalidating the judgment" in the first case as a basis for collateral estoppel here. *Sunnen* case, 333 U. S. 591, 68 S. Ct. 715, 719.

3. In holding that as to the evidence in the first and second cases for different tax years "* * * the relevant facts are identical and inseparable" (Opinion 11), the Court overlooked and failed to consider, although pointed out by Appellants (R.B. 6, 7), the important nature and greater convincing power of this documentary evidence (kept out of the first case, 287 F. 2d l.c. 1007, but admitted in the second case) in the nature of written records and correspondence prepared and kept by Continental Casualty Company and the Forrest Jones Agency in the reg-

ular course of business, showing the official records and correspondence of said companies, having interests adverse to Appellants, recorded the 5% commissions here involved as the money of Forrest Jones in contradiction of oral testimony of defense witnesses, some of whom had made the records, and all of whom had such present or past relationships to Continental or Forrest Jones as to reasonably likely have testimonial motivation in favor of defendant and adverse to plaintiffs. (M.B. 37-54)

In so ruling this Court brought its opinion and judgment herein into direct and irreconcilable conflict with the controlling case of *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746, where the Court said: (68 S. Ct., l.c. 542)

> "The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. * * * On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

This Court in its opinion undertakes to demonstrate that the different evidence in the second case was so weak it would not likely induce a different verdict (Opinion 9, 10, 11) but fails completely to mention or discuss this important documentary evidence with its dominating probative force which could reasonably be expected to make the

difference in the case under proper instructions, although presented in our briefs. (R.B. 6, 7)

This Court's opinion on this point is in direct conflict with the opinion of the Ninth Circuit in the case of *Parker* v. *Westover,* 9 Cir., 221 F. 2d 603, where the Court said: (l.c. 606)

> "* * * The possibility of a different verdict because of the introduction of evidentiary facts different from those before a court and jury in a prior case is sufficient to surmount the danger of collateral estoppel in an income tax situation. The new evidence need not positively change the character of the case. It need only change the complexion of the significant facts presented to the jury. The settlement of an evidentiary fact question, once in dispute before a jury, which has a significant bearing on the case lifts the bar of collateral estoppel. In a new trial, both the taxpayer and the Government will be in a position to argue to a jury the effect of this new evidentiary fact upon the original partnership agreement."

That case is cited by this Court in footnote 2 on page seven, but the quotation is not apropos as it specifies the case referred to "had this same evidence before it", when here this documentary evidence, evidence of valuation of the Agency and changed relationship of Mrs. Rubel in 1958, was not before the jury in the first case, because removed by objections of opposing counsel.

4. This Court erred in affirming the judgment below for defendant on the erroneous theory the finding in the earlier 1956 and 1957 case (where upon defense objections documentary evidence of great probative force and all evidence income tax facts for the later years of 1958, 1959,

1960, and 1961 here involved were studiously kept from the jury in the earlier case—R.B. 9, 10, 11— And where the legal issues of good will and economic reality were recognized for submission in this case, but were not in the earlier case—R.B. 10, Paragraph 2) that the income for those years was taxable as ordinary income became res adjudicata and conclusive under the doctrine of collateral estoppel as to income tax liability of plaintiffs for the later years of 1958, 1959, 1960, and 1961 involved in this suit, and thereby brought its Opinion and Judgment into direct and irreconcilable conflict with the controlling decision of the Supreme Court of the United States in the case of *Commissioner* v. *Sunnen*, 333 U. S. 591, 68 S. Ct. 715, 96 L. Ed. 898, holding:

> "Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action." 333 U. S. l.c. 719)."
>
> "And so where two cases involve income taxes in different tax years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts and applicable legal principles remain unchanged. Tait v. Western Md. R. Co., supra. If the legal matters determined in the earlier case differ from those raised in the second, collateral estoppel has no bearing on the situation." (Emphasis ours) 333 U. S., l.c. 599-600.
>
> "But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." 333 U. S., l.c. 601.

Here the facts were made separable by exclusion in the earlier case upon objection by the Commissioner's counsel.

The Opinion and Judgment herein are also in direct conflict with the decision of the Ninth Circuit in the case of *Parker* v. *Westover*, 9 Cir., 221 F. 2d 603 (referred to in footnote 2 at the bottom of page 7 of the Opinion herein) where that Court ruled a similar issue directly opposite to the ruling of this Court, saying: (221 F. 2d, l.c. 606)

> "Appellee contends that this does not preclude the application of collateral estoppel. He points out that the same ultimate question of fact decided in 1950, namely, that the appellants did not intend a bona fide partnership, is once again directly before the court. Appellee further asserts that this additional evidence does not substantially change the facts with respect to the tax years 1945 and 1946 from those which were before the jury in the case involving 1944.
>
> [6, 7] We must disagree."

The opinion herein is likewise in conflict with the case of *Jackson* v. *King*, 5 Cir., 223 F. 2d 714, where that Court said: (l.c. 718)

> "[5] The Collectors insist that the principle of collateral estoppel required the court below to direct a verdict, because of the prior adjudication that the gains on the sale of houses in 1946 were ordinary income, in King v. Commissioner, supra. They cite Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591, 68 S. Ct. 715, 92 L. Ed. 898, in support of this contention. However, the Sunnen case seems to us to be directly to the contrary, requiring us to hold that collateral estoppel does not apply with respect to the

sales in 1947 and 1948, because the earlier litigation involved the gains on different transactions in 1946, however similar they may have been."

Furthermore, the findings in the first case left undecided whose money paid Mrs. Rubel, for whom services were rendered or whether services were rendered under the contract herein. (R.B. 12) The findings were vague and a long way from being completely conclusive and airtight as this Court has held, and fell far short of being a full and complete adjudication.

SUGGESTIONS IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

Appellants respectfully submit the following suggestions in support of their petition for rehearing.

In the case of *United States* v. *Friedland*, 2 Cir., 391 F. 2d 378, the Court in considering the issue of collateral estoppel said: (l.c. 382)

> "The party claiming the estoppel, in this case the appellant (appellee here) has the burden of proof on that issue. United States v. Feinberg, 383 F. 2d 909 (2d Cir. 1967)."

In the case of *Rachal* v. *Hill*, 5 Cir., 435 F. 2d 59, the Court said: (l.c. 62)

> "While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding

and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case. See United States v. Webber, 3 Cir., 1968, 396 F. 2d 381, 389; Graves v. Associated Transport, Inc., 4 Cir., 1965, 344 F. 2d 894 (Virginia law)."

Clearly issues of Good Will and Economic Reality were not "actually litigated" in the first case as they were not submitted to the jury and the fact they might have been litigated there is no excuse to defendant who prevented such issues from being submitted as matters of procedure and not on their merits.

In the case of *Fairmont Aluminum Co.* v. *C.I.R.*, 4 Cir., 222 F. 2d 622, the Court said: (l.c. 625)

> "A judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form. Swift v. McPherson, 232 U. S. 51, 34 S. Ct. 239, 58 L. Ed. 499; Clegg v. United States, 10 Cir., 112 F. 2d 886; 30 Am. Jur., p. 944; 49 C.J.S., Judgments, § 8, p. 33; 27 Words and Phrases, Merits, pp. 146-147."

Neither trial measured up to this. See *Foman* v. *Davis*, 371 U. S. 178, 181-182, 9 L. Ed. 2d 222, 83 S. Ct. 227, 230.

The opinion in the earlier case (387 F. 2d 1007, 1008) shows on its face that material matters of law and fact did not receive that consideration and application they were entitled to receive under the applicable facts and law, being deprived thereof by procedural rulings induced by objections of defendant.

Judge Stanley, who tried the first case, thereafter in this case twice overruled defendant's Motion for Judgment

on collateral estoppel. (R. 32, 43) We fail to see any reluctance or uncertainty in his memorandum order on the second hearing. (R. 49-50) The footnote at the bottom of page 2 of this Opinion outlines the trial errors in this case of such great force and prejudicial nature as to leave the judgment herein indefensible as pointed out in our briefs. (M.B. 30-71; R.B. 22-24) For the foregoing reasons we respectfully submit this Petition for Rehearing should be granted.

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APPENDIX C

ORDER OVERRULING PETITION FOR REHEARING

SEPTEMBER TERM—SEPTEMBER 22, 1972

Before Honorable Alfred P. Murrah, Honorable Oliver Seth and Honorable James E. Barrett, Circuit Judges.

No. 71-1386

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Upon consideration of appellants' petition for rehearing, it is ordered that said petition be and is denied.

The mandate was stayed to allow this application for certiorari and no judgment has been entered by the Court of Appeals.

APPENDIX D

PLAINTIFFS' REPLY (KC-2898)

(Filed February 25, 1969)

Come now plaintiffs and for reply to defendant's Amendment to Answer setting up the doctrine of equitable estoppel as its First Defense, deny, alleges and state as follows:

1. The matters raised in this second suit are not identical in all respects with that decided in the preceding suit as there are important changes in the controlling facts and applicable legal rules.

2. The legal matters determined in the earlier case are more limited and differ in many respects from those raised in this case.

3. This proceeding involves the tax year 1958, which involves a new tax year and a new liability with separable issues from the previous suit involving only the tax years 1956 and 1957.

4. The legal matter raised in this suit does not involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment.

5. New evidence will be offered which will not only change the complexion of the case but will also change the entire character of the case.

6. Plaintiffs were not given "full opportunity to be heard" or "full and fair opportunity to litigate these issues" in the earlier case on the practical interpretation and construction placed on the contracts by the parties.

7. The matter referred to in Paragraph 6 above was not "fully tried on the merits" nor was it "completely adjudicated" in the earlier case.

8. Substantial documentary and parol evidence relating to the relationship between the parties and their practical construction of the contracts was excluded in the earlier case.

Some of such evidence excluded in the earlier trial consists of Exhibits L, M, N, O and P (Tr. 607-615) representing an exchange of correspondence between one Osborn (then Continental's Assistant Comptroller) and the office managers of Continental's branch offices in Kansas City and St. Louis, informing the branch managers of Continental's Home Office procedures established for handling this account by withholding 5% from the usual commissions to the Agency, retaining it in their ledgers until the end of the year and then remitting the retainage to Mrs. Ruth J. Rubel Jones and directing the branches to follow the Home Office procedures as to this account.

Other evidence not admitted in the earlier trial consisted of 50 monthly premium and commission billings sent to Forrest Jones by Continental showing the entire commission as the property of Forrest Jones including the 5% of the premiums due Ruth J. Rubel Jones.

9. Competent and substantial evidence of the existence of good will developed by the agency and its value was excluded in the earlier case.

10. The issue of the existence and value of the good will of the agency was not submitted to the jury or determined in the earlier case.

11. In the earlier case the Court denied the requested instruction No. 7 on good will offered by these plaintiffs (there defendants) and gave no instruction on good will.

12. While there was a claim that Ruth J. Rubel Jones performed services for the agency and Continental Insurance Company in the years 1956 and 1957, the evidence will be that she performed no services for either in 1958.

13. In the trial of the earlier 1956, 1957 case the Court in a preliminary pre-trial order eliminated consideration of evidence involved in the 1958 tax year, and thereafter at the trial systematically excluded such evidence.

14. The Court's charge in the earlier case carefully limited the issues to the years 1956 and 1957.

15. The verdict of the jury limits its findings to the years 1956 and 1957.

16. The issues of the 1958 tax liability were not actually presented or determined, in whole or in part, in the earlier case.

17. The jury verdict in the earlier case did not determine whose money paid Mrs. Jones, whereas in this case the evidence in this case will be that the money so received by Mrs. Jones was the money of Forrest Jones paid her as a part of the purchase price of the agency and not for services.

18. The limited jury finding in the 1956-1957 case

> "that the amounts received by Mrs. Ruth J. Rubel Jones from Continental Casualty Company * * * for 1956 * * * and for 1957 were ordinary income received for services which she rendered or agreed to render".

left undecided either directly or as an essential finding of such decision, the following:

(1) Whether such services were performed pursuant to the contracts in question;

(2) Was she paid for services rendered, or services that she only agreed to render;

(3) Whose money paid her;

(4) Were the services rendered as a part of the purchase price of the Agency or independently thereof;

(5) For whom were such services rendered?

These are material matters not directly decided in the 1956-1957 case, are not facts essential to such decision, and so are not subject to the bar of estoppel by judgment, but are open for determination in this case.

19. Because of the Government's objections the Court in the earlier case in its pre-trial order excluded any issue of these plaintiffs' tax liability for years beyond 1957 and upon objections by the Government during the trial of that case the Court systematically excluded evidence of 1958 events or transaction which could have any bearing on these 1958 tax issues. Having by its objections at the earlier trial succeeded in causing the Court to exclude such evidence and thereby obtained the victory the Government as defendant in that case, is now estoppel to claim such issues were fully litigated and finally determined in the earlier case.

20. Having caused evidence as to the tax year 1958 to be excluded in the earlier case and thereby gained the victory in that case defendant may not now reverse itself and maintain the inconsistent and contradictory position that the tax issues for the year 1958 were fully and fairly litigated, adjudicated and finally determined in that action.

21. Continental Casualty Company was interested in helping Forrest Jones acquire the Ruth J. Rubel Insurance

Agency, then engaged in writing insurance business for that company; Forrest Jones did not have the necessary funds or independent credit to finance such purchase; Continental was willing to help finance such purchase provided it was given adequate security for the money advanced including written assurance that Forrest Jones would acquire the agency with all of its good will built up over the years; Ruth J. Rubel Jones likewise was not willing to sell her agency on part payment down and installments over a period of years without adequate security, so it was agreed that Continental would loan Forrest Jones $55,000.00—$50,000.00 to be paid Ruth J. Rubel Jones as the down payment on such purchase price, and $5,000.00 to help him get started; That the commissions due the agency, which for the most part consisted of 22 ½% of the premiums, would be handled in this way: the agency would retain 17½% and a sum equal to the other 5% would be forwarded to Continental for delivery to Ruth J. Rubel Jones as payments on the purchase price of the agency; thus giving her the benefit of a double audit of Forrest Jones' accounts. These payments were to continue for a period of ten years under Forrest Jones' guarantee such payments would not be less than $16,000.00 in any year.

The several written contracts involved here were drawn to accomplish such purposes.

The agency was delivered to Forrest Jones and thereafter operated by him. In performance of such agreement the agency retained all the commission due it except the before mentioned sum equivalent to 5% of the premiums collected which it forwarded to Continental for delivery to Ruth J. Rubel Jones as payment on the purchase price of such agency.

The above facts were not fully tried on the merits or fully adjudicated and determined in the earlier case and are now open to trial and determination in this case.

22. Prior to this sale the agency was netting in excess of $68,000.00 per year, which capitalized at 6% made it reasonably worth in excess of $400,000.00 and plaintiffs would never have considered selling it for the sum of $50,000.00 as claimed by defendant to be the full and complete sale price of the agency.

23. Ruth J. Rubel Jones never at any time rendered any services, nor was she ever requested to render any services for Continental.

24. Ruth J. Rubel Jones rendered no services, as such to Forrest Jones or his agency but did, in good faith in aid of the orderly transfer of the good will of the agency to Forrest Jones and his agency, assist in acquainting him with the agency procedures and mode of operation and introducing him to the group leaders and persons insuring through the agency, which assistance was not required under her contract with Forrest Jones but was rendered voluntarily and in good faith by her to assist Forrest Jones and the agency in making the transition.

25. On one or more occasions Forrest Jones paid direct to Ruth J. Rubel Jones the 5% owed her under his purchase agreement.

26. On another occasion when Forrest Jones had not provided Continental with a certain 5% item due Ruth J. Rubel Jones on the purchase price of the agency Continental paid her and was reimbursed by Forrest Jones.

27. The primary, compelling, overall and all-important purpose of the various written instruments involved herein was the sale and transfer of the agency and its good will to the buyer for an adequate consideration to the seller under proper safeguards for its execution. When properly construed, and in the light of the actions of the parties that was their ultimate purpose which should override all other considerations advanced by defendant.

28. The reference in the written instruments to Ruth J. Rubel Jones being required to make herself available to Continental for consultation was a sham arrangement, never intended to be used and never used, slipped into the sales contract for tax purposes by Forrest Jones and Continental to the disadvantage of a tax ignorant party.

29. Other evidence excluded in the earlier trial consisted of correspondence and documents showing the 5% due Ruth J. Rubel Jones from the St. Louis Medical Society Group Business was derived from his commission from said business.

30. Other evidence excluded in the earlier trial in the nature of correspondence and premium and commission reports made by the Forrest Jones Agency to its subagent John Squibb Agency, Springfield, Missouri, expressly set forth Forrest Jones' commission as 22½%.

WHEREFORE, having fully replied plaintiffs pray judgment in accordance with their petition.

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(Served February 25, 1969.)

APPENDIX E

DISTRICT COURT OPINION AND ORDER DENYING COLLATERAL ESTOPPEL

Memorandum and Order (KC-2351)

(Filed June 4, 1970)

This is an action for refund of income taxes claimed to have been overpaid by the taxpayers for the year 1958. The basic facts are set forth in the opinion of the Tenth Circuit affirming a judgment in favor of the government with respect to the plaintiffs' tax liability for the years 1956 and 1957. *Jones* v. *United States*, 387 F.2d 1004 (10th Cir. 1967), *cert. denied*, 392 U.S. 927 (1968). However, it is necessary to an understanding of the government's present motion for summary judgment to restate some of the salient facts.

Prior to 1953, Ruth J. Rubel Jones was the owner of an insurance agency which specialized in selling accident and health insurance coverage to teachers' groups in Kansas and Missouri. Continental Casualty Company was the underwriter for this insurance, and paid Ruth 22-½% of the premiums as commission on group policies which she sold. The agency was incorporated in 1953 and by an agreement of sale dated August 29, 1953, Ruth agreed to sell all of her stock in the agency to one Forrest T. Jones (not related to the plaintiffs) for the sum of $25,000. This agreement was amended three years later to show that the actual purchase price agreed upon by the parties was $50,000.

Contemporaneously with the agreement of sale, Ruth Jones and Continental Casualty Company entered into an agreement under which Ruth agreed for a period of ten

years "to represent, act and serve as a consultant for Continental on matters relating to the soliciting, negotiating, underwriting and placing of Teachers' Group Insurance as shall be requested by Continental," and Continental agreed to pay Ruth "for said services a sum equal to 5% of the premiums on any insurance written through Continental by Forrest T. Jones or the Ruth J. Rubel Jones Agency, Inc." A "guaranty" agreement was also executed by Ruth and Forrest under which the latter guaranteed to Ruth that the payments received by her under the "five percent agreement" would not be less than $15,000 per year, and that in the event the payments did not equal that amount, Ruth would have an option to purchase all of the capital stock of the agency for the sum of $1.00.

The contentions of the parties in the earlier case (*United States* v. *Jones*, No. T-3359 (D. Kan. 1966)) and the factual issue there submitted to the jury, are succinctly set forth in the opinion of the Tenth Circuit:

> "On trial of the case Ruth argued that the substance of the transaction was the sale of her insurance agency to Forrest; that the $50,000 to be paid under the amended Agreement of Sale was merely a down payment; and that the five percent payments, guaranteed to be at least $15,000 per year, were installment payments on the total purchase price. The Government, on the other hand, argued that Ruth was merely selling her stock in the Ruth J. Rubel Agency, Inc., pursuant to the Agreement of Sale for a total purchase price of $50,000, and that the five percent agreement • • • constituted a separate agreement between Continental and Ruth for consulting services. • • • The factual issue submitted to the jury was whether the amounts received in 1956 and 1957 by Ruth from Continental (i.e., $86,101.09) were part of the sale price

> of Ruth's insurance agency, hence capital gains, or compensation for services rendered, hence ordinary income. * * * The jury returned a verdict for the Government, finding that the amounts received by Ruth were 'ordinary income received for service which she rendered or agreed to render.'" (p. 1006)

After the jury returned its verdict in the earlier action, the government moved for summary judgment in the present case upon the basis that the issues which the plaintiffs now seek to present were previously decided adversely to them by a jury and are therefore barred under the doctrine of estoppel by judgment. This court denied the motion upon the authority of *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). In that case, the Court said:

> "* * * (W)here two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit *is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.*" (Emphasis added) (pp. 599-600)

The government's previous motion was denied because the court did not believe that the underlying facts in this case were sufficiently clear at that time to grant the motion, consistent with *Sunnen*. This deficiency the government has attempted to correct by means of interrogatories designed to indicate in what respect the taxpayers contend that the facts have changed since the last trial. These matters are covered in the taxpayers' answers to interrogatories numbered 19, 20, 21, 26 and 27. The factual changes which, according to the taxpayers, make inapplicable the

doctrine of collateral estoppel, or estoppel by judgment, are:

(1) That during 1958, Ruth J. Rubel Jones received five percent of the gross premiums of the St. Louis Medical Society, an account not originated by her and as to which she rendered no services at any time.

(2) Beginning in 1958, Ruth J. Rubel Jones ceased all connection with the agency and Forrest T. Jones, whereas in 1956 and 1957 she had a desk in the agency office and assisted Forrest Jones in learning the business.

(3) Exhibits L, M, N, O and P which were offered by the taxpayers in the earlier trial, but excluded by the court (and not therefore considered by the jury), and certain other exhibits (i. e., premium and commission billings) refute the claim that the 5% payments made to Ruth Jones in 1958 were for services rendered or to be rendered.

It is apparently the taxpayers' position that they will be able to show, by means of various exhibits excluded from the former trial and directly related to the 1958 tax year, that the commissions of Forrest Jones on policies which he sold were reduced by 5%, and that this percentage was retained by Continental for transmission to Ruth in part payment for the sale of her agency. They also contend that they will be able to produce competent evidence bearing on the value of the Ruth J. Rubel Jones Agency at the time the various agreements involved in this litigation were executed, evidence which was not before the jury that decided the 1956-1957 case.

In *Commissioner* v. *Sunnen*, *supra*, quoted earlier in this memorandum, the Court said:

> "• • • *And if the very same facts and no others are involved in the second case, a case relating to a different tax year*, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." (Emphasis added) (p. 601)

The Tenth Circuit said in *Gillespie* v. *Commissioner of Internal Revenue*, 151 F.2d 903 (10th Cir. 1945):

> "Tait v. Western Maryland R. Co., supra, established the rule that although taxation is based upon annual accounting periods, each of which gives rise to a different cause of action, nevertheless the judgment in the first case is conclusive of the second if the issues presented are the same under precisely identical facts. But, the identity of the controlling facts must be clearly and affirmatively shown upon the record. • • • It is rightly said that the doctrine should be sparingly applied in tax cases involving liability for different years • • •." (p. 906)

The court held that the doctrine of estoppel by judgment was applicable to that case, and the taxpayer was therefore precluded from proceeding in a second suit. However, the opinion specifically indicates that no new facts were tendered in the second suit which did not exist or were not available for production in the former case, and that the controlling facts had remained static in the interim between the first and second suits.

In a situation closely analogous to our own, the doctrine of collateral estoppel was held to be inapplicable.

Parker v. *Westover*, 221 F.2d 603 (9th Cir. 1955). In that case, the validity of a partnership agreement for tax purposes was before the court. A husband and wife and their four minor children had entered into a partnership, the agreement being executed on behalf of the children by their father as guardian. The parents were given deficiency notices with respect to their tax liability for the 1944 tax year upon the ground that the children were not valid partners. The tax was paid and a suit for refund initiated by the taxpayers resulted in a jury verdict favoring the Commissioner. Subsequently the taxpayers sued to recover taxes, assessed by the Commissioner upon the same basis, for the tax years 1945 and 1946. The judgment of the district court dismissing the second suit under the doctrine of res judicata was reversed on appeal. The court commented, after quoting extensively from *Commissioner* v. *Sunnen, supra*, that:

> "Appellee contends that this does not preclude the application of collateral estoppel. He points out that the same ultimate question of fact decided in 1950, namely, that the appellants did not intend a bona fide partnership, is once again directly before the court. Appellee further asserts that this additional evidence does not substantially change the facts with respect to the tax years 1945 and 1946 from those which were before the jury in the case involving 1944.
>
> "We must disagree. The possibility of a different verdict because of the introduction of evidentiary facts different from those before a court and jury in a prior case is sufficient to surmount the danger of collateral estoppel in an income tax situation. The new evidence need not positively change the character of the case. It need only change the complexion of the

significant facts presented to the jury. The settlement of an evidentiary fact question, once in dispute before a jury, which has a significant bearing on the case lifts the bar of collateral estoppel. In a new trial, both the taxpayer and the Government will be in a position to argue to a jury the effect of this new evidentiary fact upon the original partnership agreement." (p. 606)

Applying the law enunciated in the cases from which I have quoted, I do not believe the doctrine of collateral estoppel is a bar to the present litigation. Although some of the exhibits, which the taxpayers insist will compel a judgment in their favor, were offered in the previous case, they were excluded by the court and were not considered by the jury in reaching their verdict. The Tenth Circuit affirmed this court's exclusion of the exhibits upon the basis that the relevancy of these items was not indicated in the statements of counsel when the exhibits were offered. However, the court indicated that in retrospect these exhibits appear to have some relevancy, in the light of the arguments made by the taxpayers on appeal which clarified their reasons for offering the exhibits. This is particularly true of those exhibits which relate to the 1958 tax year. The taxpayers also assert that they will be able to introduce competent testimony establishing the value of the agency at the time of sale to be far in excess of the $50,000 which the government contends constituted the purchase price. There is, in addition, the claim that Ruth J. Rubel Jones ceased to have any connection whatever with the agency after 1957, whereas the undisputed facts indicate that she did assist Forrest Jones in 1956 and 1957, the years involved in the earlier suit. Although this fact standing alone would seem to involve only a change in emphasis of the facts, see *Parker* v. *Westover*,

supra, since testimony to this effect was presented in the first case, further elaboration on the relationship between Ruth Jones and Forrest Jones in 1958 and succeeding years may be accomplished in this proceeding. The taxpayers' answers to interrogatories which are pertinent to this motion carry the implication that such elaboration will in fact be made. Finally, the taxpayers assert their ability to establish, by means of exhibits that were not admitted in the previous trial, that Continental merely acted as a conduit for payments by Forrest Jones on the purchase price of the agency, and that 5% of the premiums which he had earned were withheld by Continental to be paid to Ruth to be applied on the purchase price.

With these factors in mind, I believe, and hold, that the doctrine of collateral estoppel (or estoppel by judgment), as defined and applied in the cases cited in this memorandum, has no application to the present litigation.

IT IS ORDERED that the defendant's motion for summary judgment be denied.

Dated at Kansas City, this 4th day of June, 1970.

/s/ Arthur J. Stanley, Jr.
Chief Judge

APPENDIX F

ORDER OVERRULING PLAINTIFFS' MOTION FOR NEW TRIAL (KC-2351 AND KC-2898)

(Filed February 26, 1971)

This case was submitted to a jury under instructions which plaintiffs now assert were erroneous and prejudicial. The jury's verdict was adverse to plaintiffs, hence their request for a new trial.

The action was brought by plaintiffs to recover income tax assessed against them and collected for the calendar years 1958, 1959, 1960 and 1961. In substance, plaintiffs claim and allege they were entitled to capital gains treatment on money received by plaintiff Ruth J. Rubel Jones, based on 5% of all premiums collected by Forrest T. Jones Insurance Agency, Inc., during the years in dispute, which they claim were erroneously treated and ruled by the Commissioner of Internal Revenue to be ordinary income.

An understanding of the issues involved in this case may be gained from the statement contained in the opinion filed by the Tenth Circuit Court of Appeals in the companion case of *Jones* v. *U.S.A.*, 387 F.2d 1004. In that case, the government brought an action to recover taxes erroneously refunded to taxpayers for the years 1956 and 1957. In the case at bar, the taxpayers now bring this action to recover taxes which they contend were erroneously assessed for the years 1958, 1959, 1960 and 1961.

Before the trial of this case, the government presented a motion for summary judgment (Doc. 9) on the ground that the issues before the Court in this suit had been fully presented in the case of *Jones* v. *U.S.A.*, supra; that the

issues had been fully litigated and decided adversely to the taxpayers and that they were barred from relitigating these issues in the instant case under the doctrine of estoppel by judgment. After extensive briefs and arguments were presented by the parties, the Court (Stanley, Chief Judge) denied the motion (Doc. 24).

The defendant United States of America denied the plaintiffs' claim of erroneous assessment and alleged that the 5% commission payments received by Ruth Jones were ordinary income for personal services rendered or promised to be rendered under her contract, arrangement or agreement with Continental Casualty Company.

Several written agreements which had been previously executed by the parties were received in evidence. The jury was instructed that all of them might be considered together with the circumstances under which they were made and the acts of the parties in determining the intention of the parties from such agreements, circumstances and acts. The parties agreed that the issue of fact to be determined was:

> "Whether the 5% payments received by Ruth Rubel Jones for each of the years 1958, 1959, 1960 and 1961 were in truth and fact a part of the purchase price paid for her agency sold in 1953, or whether such payments were ordinary income for personal services rendered or promised to be rendered under her contract, arrangement or agreement with Continental Casualty Company."

Without reviewing all of the evidence from which the jury concluded and found that the 5% payments received from Continental Casualty Company were ordinary income received for services which Ruth Jones rendered or agreed to render, the record discloses that a verdict was returned

for defendant, denying the claim of plaintiff. The Court now finds and concludes that credible evidence supports the verdict and finding of the jury.

Plaintiffs have filed a motion for a new trial, alleging in substance that:

I. The Court erred in giving Instruction No. 13 dealing with the presumption of correctness of assessments made by the Commissioner of Internal Revenue.

II. The Court erred in sustaining defendant's objections to plaintiffs' closing arguments to the jury in which plaintiffs' counsel undertook to argue that other persons might be liable for the tax erroneously imposed by the Commissioner on plaintiffs.

III. The plaintiffs were prejudiced by giving of Court's Instructions numbered 2, 3, 10 and 13 over plaintiffs' objections because of repeated and overemphasis by the Court of the action of the Commission when the Court erroneously and unlawfully told the jury in Instruction No. 13 the plaintiffs must overcome by a preponderance of the evidence the assessment by the Commissioner.

IV. Instruction No. 14 was erroneous and prejudicial because it told the jury that whether Ruth Rubel Jones ever actually rendered any significant consulting services during the years 1958, 1959, 1960 and 1961, would not change the fact that the monies received by Mrs. Jones, under Exhibit "E" (the agreement in which Continental promised to pay her for consulting services), would be ordinary income which plaintiffs contend deprived them of the benefit of such evidence in support of their claim that no such services were ever expected of her.

V. Instruction No. 16 was erroneous because argumentative, partisan and unfair, and in conflict with In-

structions numbered 11 and 12 and Instruction No. 16, which makes Exhibit "E" the controlling instrument and because it erroneously isolates Exhibit E and negatives Instructions numbered 11 and 12.

VI. Instructions numbered 7, 13 and 16 overemphasized the plaintiffs' burden of proof and because 13 and 16 constitute misstatements of the law.

VII. The Court erroneously refused to give plaintiffs' requested Instructions numbered 18 and 19 on good will.

VIII. The Court erroneously refused to give plaintiffs' requested Instruction No. 17 because the subject matter was not otherwise covered in the Court's instructions.

IX. The Court erroneously refused to give plaintiffs' Instruction No. 15 on plaintiffs' theory of the sale as a going business with all its assets, business and good will, which was one of the main issues in the case.

X. The Court erroneously refused to give plaintiffs' Instruction No. 6 on looking through form to substance of the transaction, and this was not covered in the Court's instructions.

XI. The Court erred, to the great prejudice of plaintiffs, in ruling that proffered expert witness David Kosh was not qualified to express an opinion on value of plaintiffs' agency.

XII. The Court erred in sustaining objections to plaintiffs' proffer of Exhibits A-4 and X-2.

THE COURT'S INSTRUCTIONS

Though plaintiffs have filed a motion for a new trial attacking many of the Court's instructions in this case, the force of their argument centers on Instruction No. 13.

As the Court instructed the jury in Instruction No. 1, all the instructions given to them must be considered as a whole in the light of all the others. They should be so considered now.

The jury was told in Instruction No. 6 that the parties themselves had agreed that the issue they were to determine was whether the 5% payments received by Ruth Jones for the years in question were in fact a part of the purchase price paid for the agency sold in 1953 or whether such payments were ordinary income for personal services rendered or promised to be rendered for Continental Casualty Company. The jury was then told that if it found the sums received to be ordinary income, the plaintiffs were not entitled to recover, but if they found that the sums received were part of the purchase price of the agency, then plaintiffs were entitled to recover.

In Instruction No. 7, the Court advised the jury that plaintiffs must prove their case by a preponderance of the evidence.

In Instructions 10, 11 and 12, the jury was told that while the payments of 5% commission were made to Ruth Jones under the contract she made with Continental Casualty Company (Exhibit "E"), they should consider all the agreements made by the various parties to the transaction, including Exhibits A, B, C, D, E and F, and if they found that these contracts and agreements were made for the purpose of carrying out one complete transaction that they should consider all the circumstances surrounding the preparation and execution of the instruments and the acts of the parties as shown by the evidence, indicating their own understanding of the obligations thereunder, and that they were bound by the construction placed thereon by their own acts.

The jury was told in Instruction No. 14 that if it found that Continental never intended to obtain Ruth Jones' promise to render services and that she never intended to promise to render services to Continental, but that the purpose of Exhibit "E" was merely to allow Forrest Jones to transfer payments to Ruth Jones in return for the sale of her business, then the payments would be taxable as capital gains.

The jury was then told in Instruction No. 15 that in determining the issue before them, they might consider the fair market value of the property sold, including all factors an informed buyer and an informed seller would take into account limited nevertheless to what the parties knew in August and September, 1953, and not events or developments which occurred at a later time.

The jury was also told by Instruction No. 16 that the terms of a clear and unambiguous contract, such as Exhibit "E", could not be changed except by strong proof that the consultation agreement never had or was meant to have any economic reality and that plaintiffs could not deny or change their contract merely because they decided subsequently that a better tax result could have been achieved in another way.

Turning to Instruction No. 13, the complaint is made that the Court told the jury that the Commissioner of Internal Revenue is charged with the duty of assessing federal taxes and there is a presumption that his assessments are correct and that if the jury found that plaintiffs had failed to prove by a preponderance of the evidence that the 5% payments were part of the purchase price for the agency, then the verdict should be for defendant.

Plaintiffs contend this instruction was so prejudicial as to deny them a fair trial. Certainly, the statement is

not incorrect. Such a presumption does exist and the burden is on the taxpayer to prove by a preponderance of the evidence that he is entitled to a refund. *Welch* v. *Helvering*, 290 U.S. 111; *United States* v. *Lease*, 346 F.2d 696 (2nd Cir.); *U. S.* v. *McNally-Pittsburg Co.*, 342 F.2d 198 (10th Cir.). In a refund case, the taxpayer is required to prove the amount of refund due. *Decker* v. *Korth*, 219 F.2d 732 (10th Cir.).

The plaintiffs place great reliance on the decision on the case of *Kentucky Trust Co.* v. *Glenn*, 217 F.2d 462 (6th Cir.), where that Court told the jury the presumption that the assessment was correct was made *upon sufficient evidence*, and that the law presumed that the Commissioner *had facts sufficient to justify the assessment he makes*, and that before the jury could disregard the assessment, they must be convinced from the evidence that the Commissioner acted, in making the assessment, *in a manner unwarranted by the actual facts and unjust to the plaintiff*. (Emphasis supplied.)

This instruction was approved by the parties at trial in the *Kentucky Trust* case. The judgment of the lower court in favor of the government was reversed because the trial judge would not permit the taxpayer's counsel to argue to the jury that the Commissioner did not have all the facts then in evidence before him at the time he made the assessment and that the facts showed that the assessment was not justified. This was error committed by the trial court in that case which required reversal. The Court of Appeals then made what it termed "observations" (dicta) about the correctness of the instruction. Among the "observations" made is a quotation from an opinion of Judge Learned Hand, *Alpine Forwarding Co.* v. *Pennsylvania R. Co.*, 60 F.2d 734, 736, in which he said:

> "If the trial is properly conducted, the presumption will not be mentioned at all—though the judgment need not of course inevitably be reversed if it is . . ."

The *Alpine* case involved a question of a bailee's liability for a damaged barge and was not a tax case. Other observations found in Vol. 2 of Devitt & Blackmar's *"Federal Jury Practice & Instructions,"* 2d Ed., p. 389, are of interest.

> "This instruction is sometimes coupled with a statement that the commissioner's determination is presumed to be correct. Such a phrasing has been omitted because it is unnecessary. It is sufficient to tell the jury that the taxpayer has the burden of showing that he is entitled to a refund. If the 'presumption' instruction is given, it is not necessary to tell the jury that the presumption disappears when evidence is introduced. The burden of proof still remains on the taxpayer-plaintiff. Holding that the jury should not be instructed in terms of a presumption of correctness, but that the giving of such an instruction is not necessarily reversible error, is Kentucky Trust Co. v. Glenn, 217 F.2d 462 (6th Cir. 1954)."

The evidence in this case indicated that following the execution of the sale agreements, plaintiffs in their tax returns for 1964 and 1965, 1966 and 1967, treated the payments received from Continental as ordinary income and paid the tax determined on this basis. Other evidence that weakened plaintiffs' case was their insistence that the sale price of the agency be shown as $25,000.00, rather than the true amount of $50,000.00, which fact later required the amendment to the Agreement of Sale to show the true purchase price (Exhibit "G"). Again, there was no effort made when the sale agreement was corrected

(August 24, 1956), to amend the agreement to disclose, as is now claimed by plaintiffs, that the purchase price of the agency include the 5% commissions paid by Continental. And so the evidence offered by plaintiffs to overcome the presumption of correctness of the assessment was far from conclusive or undisputed. Under the circumstances, plaintiffs were not prejudiced.

This is not a case where the uncontradicted evidence of taxpayers showed an improper determination by the commissioner. As noted, the actions of plaintiffs themselves offered the strongest evidence against them and tended to confirm the correctness of the commissioner's determination.

This is a case where reasonable minds could not necessarily agree as to whether the evidence renders the nonexistence of the presumed fact more probable than not, in which situation it was proper to instruct the jury to find in favor of the existence of the presumed fact unless they find from the evidence that its existence is more probable than its nonexistence, in which event they should find against its existence. See, *Proposed Rules of Evidence of the United States Courts*, Rule 3-03(c)(2)(c), p. 41, and 1 *Jones on Evidence*, 5th Ed., §119, p. 205.

Instructions numbered 2, 3, and 10 correctly stated to the jury the issue involved, the claims of plaintiffs in their pleadings, and that no dispute existed as to the amount Ruth Rubel received from the Casualty Company under the terms of the contract (Exhibit "E"), and that the ultimate question to be determined in the case was how these payments are to be treated for tax purposes. These instructions submitted to the jury the issue to be decided by it, consistent with the agreement of the parties themselves as to the issue involved.

Instruction No. 14 advised the jury that if they found that Continental never intended to obtain Ruth Jones' services and that she never intended to render any, but that the purpose of Exhibit "E" was merely to allow Forrest Jones to transfer payments to her in return for the sale of her business, then the payments would be taxable as capital gains. Plaintiffs could not have been prejudiced by this instruction.

Unless it was established by the evidence that the contracts entered into by the parties did not carry out their intentions as shown by their acts and interpretations of the agreement in carrying it out, they could not escape the plain language of the contract into which they had elected to enter simply because a tax advantage could be gained by doing so, and the jury was so instructed in Instruction No. 16.

REQUESTED INSTRUCTIONS NOT GIVEN

Plaintiffs complain that the Court refused their requested instructions numbered 18 and 19 which defined "good will." Nothing in the record of the case justified an abstract instruction on good will and nothing in the agreements or negotiations of the parties indicated that any consideration was given to "good will" as an element of the negotiations and sale of the stock in the agency.

The instructions given by the Court covered the substance of plaintiffs' requested instructions numbered 17, 16 and 6. The theories propounded in these requests were submitted to the jury.

THE EXPERT WITNESS

Plaintiffs offered the testimony by deposition of David Kosh, submitted as an expert witness qualified to give an opinion as to the value of the plaintiffs' agency at the

time of the sale. It appeared that the witness, offered as an expert, had never been engaged in the insurance business, had never inspected the agency in question, his background experience was limited to evaluation of utilities and kindred business operations before regulatory bodies. The evidence was rejected for the reason that it appeared the expert lacked the evidence, acquaintance and knowledge of the insurance business to make his opinion of any value to the jury in determining the issue in the case. There was no error in this. See *Jones* v. *United States*, supra, p. 1008.

EXCLUSION OF EXHIBITS

Plaintiffs complain that prejudicial error occurred when the Court excluded from evidence Exhibits A-4 and X-2. These were letters written in 1956 and 1957, referring to commissions due the persons addressed under unrelated business dealings and were designed to create more confusion than assistance in aiding the jury in determining the issue submitted under the stipulation of the parties.

PLAINTIFFS' JURY ARGUMENT

Plaintiffs argue that their counsel should have been permitted to argue to the jury that persons other than plaintiffs were in fact liable for the taxes assessed against them. There was no evidence in the record to support such an argument, at least the contention was highly speculative and outside the agreed issue to be decided. Plaintiffs were not prejudiced by the Court's ruling.

CONCLUSION

The Court is satisfied that the jury correctly determined this case. The evidence in the record is strong, if not overwhelming, that plaintiffs themselves considered

the 5% of commission payments to be ordinary income for the first four years the agreements were carried out. The agreements disclose that plaintiff Ruth Jones sought and was granted a guarantee that her services would provide compensation to her of not less than $15,000.00 per year for ten years. It was not until dissension developed between her and Forrest Jones and the amount of compensation increased from $23,118.31 in fiscal 1953-54 to $49,245.19 (it has been much more since), that plaintiffs took another look at the deal that had been made and concluded to introduce a new approach to the matter with the view of substantially reducing their tax liability. The issue has now been tried twice to different juries. Both juries have found against their contentions. Perhaps the motion of the defendant, presented at the close of plaintiffs' evidence, for a directed verdict on the ground that plaintiffs were estopped by the judgment of the earlier case, should have been sustained, but in an effort to afford plaintiffs a full opportunity to be heard on the issue, the Court concluded to submit the issue again. This was done and a review of the record discloses the verdict was manifestly correct and must be affirmed.

Substantial justice has been done in this case, and the record and my detailed trial notes, which I have reviewed, disclose no error or defect that affects the substantial rights of the parties.

The motion for a new trial must be denied and overruled.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 25th day of February, 1971.

/s/ George Templar
United States District Judge

ORDER NUNC PRO TUNC (KC-2351 AND KC-2898)

(Filed March 18, 1971)

The Court's attention has been called to an error existing in its Order Overruling Plaintiffs' Motion for a New Trial, entered February 25, 1971. On page 8 of the Order, the 8th line from top of the page, is recited the following statement, ". . . tax returns for 1964 and 1965, 1966 and 1967 . . .," which should correctly read, ". . . tax returns for 1954 and 1955, 1956 and 1957. . . ."

The correction indicated is adopted and incorporated in the Order of the Court, and as corrected, the Order is ratified and confirmed.

The Clerk will mail copies of this Order Nunc Pro Tunc to attorneys of record in the case.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 17th day of March, 1971.

/s/ George Templar
United States District Judge

APPENDIX G

INSTRUCTION NO. 15 GIVEN IN PRESENT CASE

INSTRUCTION NO. 15

Some evidence has been received as to the fair market value of the property sold by plaintiff Ruth J. Rubel Jones to Forrest Jones. In determining the issue to be decided, you may consider, among other things, this fair market value of the property sold. In determining the fair market value of the insurance agency at the time of sale, you may consider not only the opinion of the witness Ruth J. Rubel Jones, who testified as to the value of the business, but also all other evidence in the case which may aid in determining the value of the agency such as but not limited to the following:

Earnings at the time of sale; earnings reasonably to be anticipated in the future; trade name under which the business is carried on; right to conduct its business at the particular place or particular area under its trade name; character of the management and special knowledge or "know how" of its staff; number and quality of its customers; good will attaching to the agency; competition of others; existing contracts as to commissions with Continental Casualty Company and with the various professional insurance groups; physical assets of the agency; the economic realities of the transaction as a whole, and such other factors as an informed purchaser and informed seller would reasonably be expected to take into account. However, on this point, you must only consider what was known to the contracting parties in August and September 1953, and not evidence of events or developments which occurred at a later time.

APPENDIX H

VERDICT AND JUDGMENT IN DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
Nos.: KC-2351
KC-2898

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

Verdict (KC-2351 and KC-2898)

(Filed June 15, 1970)

We, the Jury, in the above entitled cause, duly impaneled and sworn, upon our oaths find that the amounts received by Mrs. Ruth J. Rubel Jones from Continental Casualty Company (that is $329,402.32, for the years 1958, 1959, 1960 and 1961) were ordinary income received for services which she rendered or agreed to render and we return our verdict for the Defendant, United States of America.

Michael J. Kelley, June 15, 1970
Foreman

Judgment on Jury Verdict (KC-2351)

(Filed June 15, 1970)

This action came on for trial before the Court and a jury, Honorable George Templar, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant, United States of America recover of the plaintiffs John Paul Jones and Ruth J. Rubel Jones its costs of action.

Dated at Kansas City, Kansas, this 15th day of June, 1970.

Charles W. Cahill
Clerk of Court

By /s/ Edward R. Delich
Edward R. Delich
Deputy Clerk

APPENDIX I

OPINION OF COURT OF APPEALS IN PRIOR CASE

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

No. 9153.

United States Court of Appeals
Tenth Circuit.

Dec. 4, 1967.

Rehearing Denied Feb. 2, 1968.

Action to recover erroneously refunded federal income taxes. The United States District Court for the District of Kansas, Arthur J. Stanley, Jr., Chief Judge, rendered judgment for the United States, and taxpayers appealed. The Court of Appeals, Murrah, Chief Judge, held that where issue was presented as to whether amounts received by taxpayer wife from insurance company were part of sale price of her insurance agency and hence capital gains or were compensation for services rendered and hence ordinary income, exclusion from evidence of interoffice insurance company letters was not error since trial court was not apprised of fact that correspondence would have tended to prove that five percent payments were part of purchase price of agency and were paid by insurer as conduit for buyer rather than to compensate for services rendered insurer by taxpayer.

Judgment affirmed.

1. Courts (Key) 406.1(3)

In determining whether refusal to admit certain letters into evidence was error, the reviewing court was required to consider the relevancy in the same context in which letters were offered to and considered by the trial judge rather than the relevancy in retrospect.

2. Federal Civil Procedure (Key) 2013

It was incumbent upon counsel who sought to introduce certain letters into evidence to apprise trial judge of purposes for which the exhibits were offered and of their probative value for such purposes.

3. Internal Revenue (Key) 1984

In action to recover erroneously refunded federal income taxes in which action issue was presented as to whether amounts received by taxpayer wife from insurance company were part of sale price of her insurance agency and hence capital gains or were compensation for services rendered and hence ordinary income, exclusion from evidence of interoffice insurance company letters was not error where trial court was not apprised of fact that correspondence would have tended to prove that five percent payments were part of purchase price and were paid by insurer as conduit for buyer rather than by company itself as compensation for services rendered by taxpayer wife.

4. Federal Civil Procedure (Key) 1432

Exclusion of deposition testimony by head of insurance company's group insurance division pertaining to his knowledge of consultants employed by company was not error where the testimony was remote and cumulative of other

evidence and its exclusion did not appear to be inconsistent with substantial justice, notwithstanding that the testimony, in retrospect, might have been relevant to show that taxpayer wife was not actually employed by company as a consultant and that five percent payments received by her from company were thus part of sale price for her insurance agency and hence taxable as capital gains rather than compensation for services and hence taxable as ordinary income. Fed.Rules Civ.Proc. rule 61, 28 U.S.C.A.

5. Evidence (Key) 546

Refusal to permit witness who testified that his specialty field was the economy, finances, regulation, evaluation and all the elements that go into the pricing of utility services but who admitted that he had never made an evaluation of an insurance company to testify as an expert on evaluation of insurance agency sold by taxpayer wife was not an abuse of discretion in action to recover federal income taxes that were refunded on wife's claim that sums reported as ordinary income were really installment sale proceeds from sale of her agency and thus taxable as long term capital gains.

6. Evidence (Key) 546

Trial court has a wide discretion in determining the qualifications of a witness to testify as an expert in matters such as determining value of an insurance agency.

7. Internal Revenue (Key) 1984

Refusal to give taxpayers' requested abstract instruction on good will in action to recover erroneously refunded federal income taxes was not error in view of the thin and tenuous basis established for the instruction by sparsity

of evidence as to value of insurance agency sold by taxpayer wife. Fed.Rules Civ.Proc. rule 51, 28 U.S.C.A.

Claude L. Rice, Kansas City, Kan., and Emmet A. Blaes, Wichita, Kan. (Thad E. Nugent, Kansas City, Kan., and James L. Baska, Olathe, Kan., with them on brief), for appellants.

Willy Nordwind, Jr., Washington, D. C. (Mitchell Rogovin, Lee A. Jackson and Gilbert E. Andrews, Washington, D. C., with him on brief), for appellee.

Before MURRAH, Chief Judge, and JONES* and HILL, Circuit Judges.

MURRAH, Chief Judge.

This action to recover "erroneously" refunded federal income taxes was instituted by the United States under § 7405(b) of the Internal Revenue Code of 1954 against Ruth J. Rubel Jones and her husband John, appellants. The sole issue submitted to the jury was whether the income on which the subject taxes were paid was ordinary income or capital gains. This appeal is from a judgment on a jury verdict in favor of the United States. We affirm.

These basic facts were stipulated. Ruth and John Jones filed joint income tax returns in 1956 and 1957, reporting as ordinary income sums totaling $86,101.09 received by Ruth from Continental Casualty Company pursuant to an instrument which we will refer to as the "five percent agreement". In that document Ruth agreed for a period of ten years "to represent, act and serve as a consultant for Continental on matters relating to the soliciting, negotiating, underwriting and placing of Teachers' Group In-

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*Sitting by special designation from the Fifth Circuit.

surance as shall be requested by Continental", and Continental agreed to pay Ruth "for said services a sum equal to 5% of the premiums on any insurance written through Continental by Forrest T. Jones or the Ruth J. Rubel Agency, Inc." In 1960 Ruth and John filed a claim for refund, asserting that the sums reported as ordinary income were actually installment sale proceeds from the sale of Ruth's insurance business to one Forrest T. Jones and thus taxable as long-term capital gains. The Internal Revenue allowed in part the claim for refund on that theory and remitted $15,992.45 to the taxpayers. Subsequently, however, the Government changed its mind and determined that the sums received by Ruth were properly taxable as ordinary income. This suit was then instituted to recover the amount of the refund.

These further relevant facts were either agreed upon or undisputed. Prior to 1953, Ruth was the owner of the Ruth J. Rubel Agency, a sole proprietorship specializing in accident and health insurance coverage for teachers' groups in the states of Kansas and Missouri. Continental Casualty Company was the underwriter of the group insurance, and paid Ruth 22½% of the premiums as commission on group policies written by her. In August, 1953, the State of Missouri granted a certificate of incorporation to the Ruth J. Rubel Agency, Inc., and pursuant to an agreement dated August 19, Ruth transferred to the new corporation all the assets of the Ruth J. Rubel Agency, including the agency and commission contracts with Continental, in exchange for 100% of the corporation's capital stock. The assets received from Ruth were recorded on the books of the new corporation as having a value of $25,000.

Prior to incorporation of the agency, Ruth had commenced negotiations with one Forrest T. Jones[1] for the

1. Forrest Jones is not related to either Ruth or John Jones.

sale of her insurance business. Continental apparently played an important role in these negotiations.[2] By an Agreement of Sale bearing date of August 29, 1953, Ruth agreed to sell and Forrest agreed to buy all of Ruth's stock in the Ruth J. Rubel Agency, Inc. The instrument expressly provided that "The aggregate purchase to be paid by the Buyer to the Seller for the stock * * * shall be the sum of Twenty-Five Thousand Dollars ($25,000), to be paid in cash at the time hereinafter specified." About three years later, the instrument was amended by a document in which Ruth and Forrest agreed that the $25,000 purchase price recited in the Agreement of Sale was incorrect, and that the purchase price actually agreed upon by the parties was $50,000.

Contemporaneously with the Agreement of Sale, the parties entered into the so-called "five percent agreement", and also a "guaranty" agreement whereby Forrest guaranteed to Ruth that the payments received by her under the five percent agreement would not be less than $15,000 per year, and that in the event the payments did not equal that amount, Ruth would have an option to purchase all of the capital stock of the Ruth J. Rubel Agency, Inc. for the sum of $1.00.

On trial of the case Ruth argued that the substance of the transaction was the sale of her insurance agency to Forrest; that the $50,000 to be paid under the amended Agreement of Sale was merely a down payment; and that the five percent payments, guaranteed to be at least $15,000 per year, were installment payments on the total purchase price. The Government, on the other hand, argued that Ruth was merely selling her stock in the Ruth J. Rubel Agency, Inc., pursuant to the Agreement of Sale for a

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2. Continental loaned Forrest the sum of $55,000. $5,000 was retained by Forrest and $50,000 was paid to Ruth.

total purchase price of $50,000, and that the five percent agreement and the guaranty document constituted a separate agreement between Continental and Ruth for consulting services. The $50,000 payment under the Agreement of Sale is concededly capital gains and is not in suit. The factual issue submitted to the jury was whether the amounts received in 1956 and 1957 by Ruth from Continental (i. e., $86,101.09) were part of the sale price of Ruth's insurance agency, hence capital gains, or compensation for services rendered, hence ordinary income. This clear-cut issue was succinctly presented to the jury in instructions which told them that "in determining whether the transaction between Mrs. Ruth Rubel Jones as seller and Forrest Jones as buyer was a single transaction implemented by the separate agreements * * *, or whether the agreement for the sale of stock to Forrest Jones * * * and the agreement by which Mrs. Jones received five percent of the premium income of the insurance agency * * * were separate undertakings, entered into for separate purposes, you will consider not only the written instruments themselves, but also all other facts and circumstances in evidence in the case which will aid you in arriving at the truth." The jury returned a verdict for the Government, finding that the amounts received by Ruth were "ordinary income received for service which she rendered or agreed to render."

Despite laborious argument of the facts in the taxpayers' brief, they do not specifically question the sufficiency of the evidence on appeal. Indeed, we think the evidence amply supports the verdict of the jury. The only arguable points here are the rulings of the trial judge excluding certain proffered exhibits and testimony, and his refusal to give an instruction on "good will".

Taxpayers offered in evidence five exhibits representing an exchange of correspondence between one Osborne

(Continental's assistant Comptroller) and the office managers of Continental's branch offices in Kansas City and St. Louis, concerning problems that had arisen over the processing of Ruth's five percent payments. In substance, the correspondence directed the branches that in accordance with previous agreements between the parties,[3] the 22½% commissions to which the Ruth J. Rubel Agency, Inc., was entitled would be reduced by 5% and that this amount would be retained on the company ledgers until a future date when it would be remitted directly to Ruth Jones. The taxpayers argue that the exclusion of the exhibits as having no probative value is reversible error because the correspondence would have tended to prove that the five percent payments were being paid by Forrest as part of the purchase price of the agency, not by Continental as compensation for services rendered, and that Continental was merely the conduit by which the deferred payments were transmitted.

[1-3] It is fair to say that the reasons for the introduction of these exhibits are far more clear in the taxpayers' brief than when offered to the trial judge. It may well be that in retrospect the letters were relevant to the nature of the transaction between Forrest and Ruth, but we must consider their relevancy here in the same context in which they were offered to and considered by the trial judge. The record shows that when each of these exhibits was offered into evidence and objected to as having

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3. In a written document dated August 20, 1953, Continental consented to the transfer by Ruth of the agency and commission contracts to the Ruth J. Rubel Agency, Inc., on the condition that, if Ruth should dispose of her stock in the new corporation, then all commissions would be reduced by 5%. In an instrument dated August 31, 1953, the Ruth J. Rubel Agency, Inc., and Continental agreed that since Ruth had sold all her stock in the Ruth J. Rubel Agency, Inc. to Forrest Jones, all commissions due the agency would be reduced by 5%.

no probative value, counsel for the taxpayers responded that they were inter-office correspondence "with respect to problems that arise with the branch offices and Continental Casualty Company on the five percent." No other explanation or claim was made for the exhibits. It was certainly incumbent upon counsel to fully apprise the trial judge of the purposes for which the exhibits were offered and their probative value for such purposes. His explanation did not do so. In these circumstances we certainly cannot say that the trial judge's exclusion of the exhibits was erroneous.

[4] Taxpayers next complain of the trial court's exclusion of the deposition testimony of Paul Fisher, head of Continental's group insurance division, pertaining to his knowledge about all consultants employed by Continental.[4] The argument appears to be that Fisher's testimony was relevant to show that Ruth was not actually employed by Continental as a consultant, and thus the five percent payments were received by her as part of the purchase price. Again, in retrospect, this testimony may have some relevancy. But it was remote, and, moreover, cumulative of other evidence; it added nothing new to the taxpayers' case. See Titanium Actynite Industries v. McLennan, 10 Cir., 272 F.2d 667; Branding Iron Club v. Riggs,

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4. The following testimony of Fisher was excluded as irrelevant: "Q. Could you state the name of all the consultants to your knowledge that were employed by Continental Casualty Company at any time? A. Mr. Milt Monash. Q. And will you state also their addresses or where they can be located? A. He lives in Atherton, California. And Mr. Densdale Walker, he lives in California, in Los Angeles, and I think Mr. Bruckner Chase was employed as a—more of a promotional consultant. When you get into that area there is a lot of others like advertising agencies and people like that. * * * Q. Other than advertising agencies, are these all the people that you know of that were employed as consultants? A. That's all I know about that I recall.

10 Cir., 207 F.2d 720. The exclusion of this evidence does not appear to be inconsistent with substantial justice in the case. See Rule 61, F.R.Civ.P.; Jones v. Union Automobile Indemnity Ass'n of Bloomington, Ill., 10 Cir., 287 F.2d 27.

[5, 6] To establish the value of the insurance agency at the time of its sale to Forrest, Ruth called as an expert witness one David Kosh. His testimony was offered to show that the value of the agency was greatly in excess of $50,000. As to his qualifications, Kosh testified that his specialty field is "the economy, the finances, the regulation, evaluation and all the elements that go * * * [into the] pricing of utility services", but he admitted that he had "never made an evaluation of an insurance company." The trial judge refused to permit the witness to testify as an expert on the evaluation of this insurance agency. Suffice it to say that we find no abuse of the wide discretion accorded the trial court in determining the qualifications of a witness to testify as an expert in matters of this nature. See Whitehead v. Salyer, 10 Cir., 346 F.2d 207; Barnes v. Smith, 10 Cir., 305 F.2d 226.

Finally, the taxpayers complain of the trial judge's failure to include in his charge to the jury a requested abstract instruction on "good will". It is argued that such an instruction was essential to the taxpayers' theory of the case that the insurance agency had a "value" far in excess of the $50,000 amount recited in the Agreement of Sale, as amended.

During trial, counsel for the taxpayers indicated that proof would be offered to establish the value of the agency at the time of the sale as tending to show that the five percent payments were part of the purchase price. Over

Government's objections, the trial judge tentatively ruled that "testimony of value, if it be competent testimony of the value, would have some bearing on that issue and would be properly admissible." Pursuant to this ruling, both taxpayers testified to the effect that, at the beginning of the negotiations with Forrest, Ruth made it clear that her asking price for the agency was three to four hundred thousand dollars. David Kosh was then called to give his opinion as to the value of the agency in 1953, but, as we have seen, the trial judge properly ruled that Kosh was not qualified to testify as an expert concerning the value of the agency. No other evidence of the agency's value was offered by the taxpayers.

[7] At the conclusion of the court's instructions, counsel for taxpayers objected "to the omission of [his] requested instruction * * * no. 7 * * * [the] instruction on good will." This form of objection raises serious doubts as to whether the trial judge was fully apprised of the nature of the objection as contemplated by Rule 51, F.R.C.P. See American Motors Sales Corp. v. Semke, 10 Cir., 384 F.2d 192; Chiode v. General Waterworks, 10 Cir., 380 F.2d 860; and Dunn v. St. Louis-San Francisco Railway Co., 10 Cir., 370 F.2d 681. But, conceding arguendo the propriety of the objection, we think the testimony regarding the asking price of the insurance agency, standing alone, formed a thin and tenuous basis for the abstract instruction on good will. Certainly, we cannot say in these circumstances that Judge Stanley erroneously refused to give the tendered instruction.

The judgment is affirmed.

APPENDIX J

EXHIBITS E-1, N AND P EXCLUDED IN THE FIRST CASE AND ADMITTED IN THIS CASE

Exhibit E-1

CONTINENTAL CASUALTY COMPANY

General Office, 310 South Michigan Ave., Chicago 4, Illinois

August 30, 1957

Mrs. Ruth J. Rubel,
5311 Mission Woods Terrace,
Kansas City, Kansas.

Dear Mrs. Rubel:

On returning to the Home Office this week I find your letter of August 23rd regarding the St. Louis Medical Society Group Plan.

When Forrest Jones first approached us with the idea of buying this case it did not seem that the business would be attractive enough to enable Forrest to pay you 5% overwrite out of the 15% commission which was the maximum we could afford to pay in view of the loss ratio. It is true that I suggested to you that it might be to your advantage to forgo the 5% overwrite on the business now on the books in view of the fact that his purchase of the business would enable him to write a lot of new business including the installation of a Catastrophe-Hospital Plan on which you would get your overwrite. When you strongly opposed the idea naturally we realized that other arrangements would have to be made. If Forrest didn't feel like taking the business subject to this overwrite we would have to sell it to somebody else.

Meanwhile, before we could get together on a deal, it became time to send out the July 1st renewal notices. I have already explained to you that Forrest agreed to take over this business with the understanding that we are to pay you your 5% commission out of the total of 15% sometime after the anniversary date. Meanwhile we were to proceed to bill the case from the Home Office and wait until after the renewal was cleaned up before actually transferring the business. As you know, the Company purchased this business from Mr. Hovey and paid him cash for it and the business belongs to the Company with no obligation to pay anybody any commission until after a sale is constituted.

In view of the fact that an agreement had been reached to consumate a sale about Sept. 1st we agreed to utilize the premium notice envelopes to inform the insured members that there would be a new administrator to give them local service for the coming year. I am enclosing a copy of this notice and you will not find anything in it directing them to pay their premiums to Forrest or the Rubel-Jones Agency. On the contrary, a reply envelope was enclosed for their remittances and it was directed back to the Home Office where all premiums had been paid.

I hope soon to consumate an agreement with Forrest which will actually effect the transfer of the business to the Rubel-Jones Agency in St. Louis. You will receive reports of all renewals that are paid thereafter and you will receive your 5% on all such payments. Of course, there will not be any renewals until February 1st when the semi-annuals will again come due. Meanwhile you will receive your 5% overwrite on any new business that is written under the plan. Neither I nor Forrest have the slightest desire or intention to resort to any subterfuge or circumvention of your contract in any manner which will prevent you from

receiving any dime that is due you on this business. I am sorry that you have become so worried about it

Sincerely yours,

/s/ Paul S. Fisher
Paul S. Fisher

Mr. James J. Mertz

Exhibit N

December 3, 1957

Mr. Richard C. Kious, Office Manager
Kansas City Branch Office
Continental Casualty Company
840 Centennial Bldg.
210 West 10th Street
Kansas City 5, Missouri

Dear Dick:

Unfortunately, we have just been notified that a special deal made with Ruth J. Rubel of the Rubel-Jones Agency of Kansas City applied to business reported through the Kansas City and St. Louis Branches as well as business reported direct to the Home Office.

A copy of the procedure set up in the Home Office is attached and I believe that your branch should follow this same procedure sending a check once a year to clear your ledger. You must be sure that the agency does not retain to much commission, as you will note from the procedure that they are to retain 5% less than their normal rate of commission and it is this 5% that should be retained on your ledger till November of each year.

The unfortunate part of this whole situation was the fact that no instructions were received that this branch

was involved. It now means that you will have to go back to September of 1953 and find out what business has been reported by the Rubel-Jones Agency through your office, the rate of commission they retained and if it was 5% less than the normal commission arrangement due pay an additional 5% to Ruth J. Rubel. You will need to prepare a report to go with any such check outlining the business which was handled and is the basis of the payment. I would suggest a photostatic copy of their original report if this is possible. I believe it would be wise on the initial report if you would send the statements and check to this writer and I in turn will discuss the matter with the agency.

I know that this is going to cause your office extra work, but there is no way we can avoid it and I wish that you would put somebody to work immediately on it, so that we can satisfy this agency in line with their original contract.

If you have any questions, please let me know at once.

Yours very truly,

R. N. Osborne
Assistant Comptroller

RNO:cb

Exhibit P

April 11, 1958

TO: R. Kious —Kansas City Branch
K. Batchelder —St. Louis Branch

FROM: R. N. Osborne
Assistant Comptroller

RE: RUBEL-JONES AGENCY

You will recall that in the latter part of last year, we called to your attention the situation which existed in relation to the above captioned agency.

At that time, you had to do a lot of work in order to satisfy the requirements of an agreement between the Company and this Agency.

I am only checking to make sure that for the year 1958, we are following the correct procedure. The procedure calls for the fact that 5% of all business placed through your office by the Rubel-Jones Agency is to be retained in your ledger until the end of the year. The Rubel-Jones Agency is to retain 5% less than the normal commission to offset this arrangement. They are to report their premiums in duplicate reports, so that an accounting can be made to Ruth Rubel.

At the end of the year, it will be necessary that you clear your ledger by drawing a check to Ruth Rubel and accompany it with reports to substantiate the check. These should be forwarded to this writer who in turn will handle it with Ruth Rubel.

At the time this whole matter came up late last year, we sent your office a copy of the actual procedure. I can not emphasize to strongly that this must be rigidly followed and if there is any question, please let me know at once.

RNO

APPENDIX K

VERDICT AND JUDGMENT IN PRIOR CASE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. T-3359

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN PAUL JONES and RUTH J. RUBEL JONES,
Defendants.

Verdict and Judgment in District Court

We, the Jury, find that the amounts received by Mrs. Ruth Rubel Jones from Continental Casualty Company (that is, $36,909.08 for 1956 and $49,172.21 for 1957) were ordinary income received for service which she rendered or agreed to render and we return our verdict for the Plaintiff, United States of America.

Charley Hall
(Foreman)

Feb. 18, 1966
(Date)

Filed February 18, 1966.

Judgment

This action came on for trial before the Court and a jury, Honorable Arthur J. Stanley, Jr., District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict;

Jones et al. vs. U.S.A.

It Is Ordered And Adjudged that the plaintiff, the United States of America, shall have judgment against the defendants, John Paul Jones and Ruth J. Rubel Jones, and judgment is hereby entered in favor of the plaintiff, the United States of America, and against the defendants, John Paul Jones and Ruth J. Rubel Jones, for the sum of $15,992.45 for the amount erroneously refunded to the defendants, and for the sum of $4,488.40 for interest to the date of this judgment, together with interest at the rate of 6% per annum from the date hereof on the total sum of $20,480.85, for all of which sums let execution issue; and for the costs of the plaintiff in this action as provided by law.

Done and Ordered at Kansas City, Kansas, this 1st day of April, 1966.

Arthur J. Stanley, Jr.
United States District Judge

Approved: Thomas E. Joyce, Asst. U.S. Atty.; Rice Groner Nugent & Baska, by James L. Baska, Attys. for Defendants.

Filed April 1, 1966.

APPENDIX L

STATUTES

Title 26, U.S.C., § 7482. Courts of review

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

Title 28, U.S.C., § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 26, U.S.C., § 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-712

JOHN PAUL JONES AND RUTH J. RUBEL JONES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is unofficially reported at 72-2 U.S.T.C., par. 9636. The district court's opinion and order (Pet. App. A29-A36) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1972. (Pet. App. A1.) A petition for rehearing was denied on September 22, 1972. (Pet. App. A21.) The petition for a writ of certiorari was filed on November 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly applied the doctrine of collateral estoppel in holding that the prior judgment on the 1956 and 1957 tax years bars petitioners from relitigating identical issues in this case with respect to subsequent tax years.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * * * *

SEC. 1222. OTHER TERMS RELATING TO CAPITAL GAINS AND LOSSES.

For purposes of this subtitle—

* * * * *

(3) *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income.

* * * * *

STATEMENT

Prior to 1953, petitioner [1] was the owner of an insurance agency which specialized in accident and health insurance coverage underwritten by Continental Casualty Company (Continental). In 1953, petitioner commenced negotiations with Forrest T. Jones (Forrest) (no relation to petitioner) for the sale of her insurance business. Continental apparently played an important role in the negotiations and loaned Forrest the necessary funds for the purchase. The agency was incorporated in furtherance of the sale plans and subsequently petitioner entered into an agreement to sell all of her stock in the agency to Forrest for the sum of $50,000. (Pet. App. A3-A4.)

Contemporaneously with the agreement of sale, petitioner entered into a so-called "five per cent agreement" with Continental. Under the terms of this agreement, petitioner agreed for a period of ten years "to represent, act and serve as a consultant for Continental on matters relating to the soliciting, negotiating, underwriting and placing of Teachers' Group Insurance as shall be requested by Continental." Continental, in turn, agreed to pay petitioner "for said services a sum equal to 5% of the premiums on any insurance written through Continental by Forrest T. Jones or the Ruth J. Rubel Agency, Inc." Forrest and petitioner also entered into a guaranty agreement, whereby Forrest guaranteed to petitioner that the payments received by her under the five-percent agreement

[1] Ruth J. Rubel Jones and John Paul Jones filed joint federal income tax returns for the years involved in this case. "Petitioner" refers to Ruth Jones.

would not be less than $15,000 per year, and that in the event the payments did not equal that amount in any three consecutive years, petitioner would have an option to purchase all of the capital stock of the agency for the sum of $1. (Pet. App. A4.)

These contractual arrangements gave rise to two separate tax refund actions. The first action involved the years 1956 and 1957 and, after trial on the merits, the issue submitted to the jury was whether, as contended by petitioner, the amounts received from Continental pursuant to the terms of the five-percent agreement were part of the sale price of the insurance agency taxable as capital gains or, as contended by the government, compensation for services rendered taxable as ordinary income. (Pet. App. A5.) The jury returned a verdict for the government. The present action involves the same contractual arrangements and payment provisions and the same issue but with respect to different tax years, 1958 through 1961. (Pet. App. A5-A6.) Based on the first judgment, the government moved for summary judgment on the ground of collateral estoppel. After denial of the government's motion (Pet. App. A29-A36), petitioner presented the same contentions to the jury in substantially the same manner as they had been presented in the prior case (Pet. App. A6). Additional evidence introduced in the present case that was either not fully developed or excluded in the trial of the first action included evidence that although petitioner had rendered services to Forrest in the years 1956 and 1957, she terminated these services in 1958. (Pet. App. A6, n.2.) The new evidence also included certain interoffice correspondence of Continental which allegedly

indicated that the five-percent payments were made from funds that belonged to Forrest rather than to Continental (Pet. App. A8), and petitioner's testimony that the value of the insurance agency at the time of sale was substantially in excess of the $50,000 price stated in the sales contract (Pet. App. A8). The case was submitted to the jury, over the government's objection, on the same issue presented in the first case, *i.e.*, whether the payments received by petitioner pursuant to the five-percent agreement were part of the sales price of the agency or whether they were compensation for services rendered. (Pet. App. A2, A6.) The jury again found for the government. (Pet. App. A5-A6.) The court of appeals affirmed the judgment of the district court on the ground of collateral estoppel. (Pet. App. A1-A9.)

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

Under the doctrine of collateral estoppel, where there has been an adjudication between the same parties on the same issues, the parties are forever barred from relitigating that issue. The doctrine, which is designed to prevent repetitious lawsuits over matters which have once been decided, is applicable in federal tax cases involving liability for different years "where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599-600. See also *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620.

The present claim is between the same parties, arises from the same contractual agreement, involves the same type of contractual payments and, except for different taxable years, involves the same factual issue. The applicable tax laws remained unchanged. The sole issue is whether the operative facts of the present case are substantially unchanged from those of the first case. The court of appeals' affirmative finding on this issue does not warrant review by this Court.

Petitioner contends (Pet. 9-13) that the facts in the instant case are sufficiently dissimilar to those in the prior action to cause the doctrine of collateral estoppel to be inapplicable. Petitioner cites evidence to the effect that she rendered no services to Forrest during the tax years involved in the instant case, whereas she actively participated in the business of the agency during the years involved in the first case. (R. 338.[2]) She also relies on her testimony that the true value of the insurance agency at the time of sale was in excess of the $50,000 contract price (R. 324), and certain interoffice correspondence of Continental which allegedly shows that the payments received were made from funds belonging to Forrest rather than to Continental (Pet. App. A64-A68). None of this evidence, however, constitutes a change in the controlling facts. Petitioner's testimony that she ceased performing services under the consulting agreement in 1958 was before the jury in the prior trial (Pet. App. A6); in any event, this

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[2] "R." references are to the separately bound record appendix prepared for use in the court of appeals. "Ex. Vol." references are to the separately bound volume of exhibits used in the court of appeals.

evidence is irrelevant to the legal issue common to both cases and conclusively adjudicated in the first case, which was the taxable character of the payments received by petitioner pursuant to the terms of the five-percent agreement. That agreement required that petitioner serve as a consultant to the agency for a period of two years from 1953. (Ex. Vol. 13-14.) Having admittedly satisfied that requirement, petitioner was therefore, under the terms of the agreement, entitled to payment for the remainder of the ten-year period regardless of whether she performed any additional services to Forrest or Continental. Since there was no requirement that taxpayer actually perform additional services under the contract, the question whether she did or did not so perform is of no consequence with respect to the taxable character of the agreements, the terms of which remained unchanged.

Nor does petitioner's testimony as to the value of the insurance agency at the time of sale or the interoffice correspondence, evidence which was offered and could have been admitted at the first trial if properly submitted (Pet. App. A8), constitute a change in the operative facts or controlling circumstances, for this evidence was available at the first trial. See *Tait* v. *Western Md. Ry. Co., supra; Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 627 (C.A. 4); *Jones* v. *Trapp*, 186 F. 2d 951, 953-954 (C.A. 10). The mere possibility of success given a second chance at producing evidence is not, in the absence of a change in the controlling law or facts, sufficient to overcome the bar of collateral estoppel. *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F. 2d 451, 463 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

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CHARLES E. ANDERSON,
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DECEMBER 1972.

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